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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1034

BETTY N. EMBRY,
Petitioner,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ROBERT C. FOULSTON
ROBERT N. PARTRIDGE
*GERALD SAWATZKY
600 Fourth National Bank Building
Wichita, Kansas 67202
Attorneys for Petitioner

Of Counsel:

FOULSTON, SIEFKIN, POWERS & EBERHARDT
600 Fourth National Bank Building
Wichita, Kansas 67202

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*Counsel upon whom service is to be made.

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Betty N. Embry respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on October 21, 1971.

OPINIONS BELOW

The opinion of the United States District Court for the District of Kansas (A. 43) is unreported. The opinion of the Court of Appeals for the Tenth Circuit (A. 17) is reported at 451 F.2d 472.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on October 21, 1971. A timely petition for rehearing was denied on November 26, 1971, and this petition for certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. (A) Must federal courts give full faith and credit under 62 Stat. 947, 28 U.S.C. § 1738 to a determination of fact in a prior state court judgment between the same parties, under the doctrine of collateral estoppel, where the causes of action in the two proceedings are different?

(B) If so, did the Court of Appeals fail to give full faith and credit to a state court judgment determining that an automobile accident aggravated pre-existing arteriosclerosis in E. Ned Embry, and that his death was "caused by, and accelerated and precipitated" by an accident?

2. Did the Court of Appeals fail to apply applicable Kansas law that accidental aggravation of pre-existing disease, such as arteriosclerosis, which accelerates or precipitates death, constitutes accidental death under accidental indemnity clauses in insurance policies, in violation of the Rules of Decision Act?

STATUTES INVOLVED

62 Stat. 947, 28 U.S.C. § 1738:

> "The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

"The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

"Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

62 Stat. 944, 28 U.S.C. § 1652:

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

STATEMENT OF THE CASE

The action below was brought by petitioner Betty N. Embry as beneficiary of four life insurance policies issued to E. Ned Embry by respondent The Equitable Life Assurance Society of the United States. The action was filed in the District Court of Sedgwick County, Kansas, and was removed by Equitable to the United States District Court for the District of Kansas, under 28 U.S.C. 1441, there being diversity of citizenship. (A. 17-18).

The insurance policies contained typical accidental death provisions, and provided a total of $75,000.00 in benefits in the event E. Ned Embry's death was caused by

accidental means, and death ensued within 90 days after the injuries suffered.[1]

On May 23, 1963, E. Ned Embry, aged 51, was injured in an automobile accident in which the impact of his chest bent the steering wheel and broke the steering column. (A. 20). Prior to this time, Embry appeared to be in good health, and was an active, robust sportsman. Thereafter, Embry suffered from chest pains, nausea and apparent indigestion until June 24, 1963, when he suffered a heart attack and died. The autopsy disclosed he had advanced arteriosclerosis. (A. 2-4, R. 89-96).

A question immediately arose whether Embry's injuries in the automobile accident aggravated the pre-existing arteriosclerosis, so as to precipitate the heart attack, and thus accelerated and caused Embry's death.

The question was pertinent in two ways: (1) At the time of the accident, and his death, Embry was employed by Equitable as state agency manager, and Mrs. Embry was eligible for state workmen's compensation benefits if death was caused by the accident.[2] (2) Under Kansas law, benefits would be owing under the accidental death insurance policies if Embry's accident aggravated a pre-existing

---

1. A typical clause in these four policies defined death from accident as "death resulting solely from bodily injuries caused directly, exclusively and independently of all other causes by external, violent and purely accidental means and ensuing within 90 days of such injuries, but does not include death resulting from or caused directly or indirectly by . . . disease or illness of any kind, physical or mental infirmity. . ." (A. 18-19).

2. K.S.A. 44-501 provides: "*The obligation.* If any employment to which this act applies, personal injury by accident arising out of and in the course of employment is caused to a workman, his employer shall . . . be liable to pay compensation to the workman in accordance with the provisions of this act. . . ."

dormant disease, thus accelerating and causing death, even though death would not have occurred but for the disease.[3]

After Embry's death, and prior to this action, Mrs. Embry filed a workmen's compensation action in Kansas seeking accidental death benefits. Accidental death benefits were awarded to Mrs. Embry in a judicial proceeding by the Kansas Workmen's Compensation Director. (A. 11). Equitable then sought review of the award in a *de novo* action in the District Court of Rush County, Kansas. (A. 1). The state district court found:

> "3. The injury sustained in the automobile accident on May 23, 1963, aggravated a prior existing physical condition, and accelerated and precipitated his death on June 24, 1963.
>
> "4. The death of Embry on June 24, 1963, was caused by, precipitated and accelerated by the accidental injury Embry suffered on May 23, 1963. . . ." (A. 10).

Those findings were not appealed, and the judgment entered against Equitable became final. The judgment was a judicial determination by a state court of general jurisdiction, and the action for compensation benefits was contractual in nature. *Gawith* v. *Gages Plumbing & Heating Co., Inc.*, 206 Kan. 169, 476 P.2d 966 (1971).

After Equitable denied Mrs. Embry's claim for accidental death benefits under the four policies, she commenced this suit, her petition asserting the prior state court judgment deciding that Embry's accident had aggravated his pre-existing arteriosclerosis, and had accelerated and caused his death, was a final adjudication of a fact issue between the parties which was binding in this litigation.

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3. *Williams* v. *Benefit Trust Life Ins. Co.*, 200 Kan. 51, 434 P.2d 765 (1967).

(R. 13-26). The district court rejected this position in overruling Mrs. Embry's motion for summary judgment (A. 43), and in overruling her motions for judgment and a directed verdict at trial. The issue was tried to a jury wherein the evidence, presented at great length (R. 89-386), was substantially the same as that presented in the prior state court action. (A. 1-16). Equitable, using the same medical witnesses, also hired additional medical experts, all of whom were permitted to testify at length that Embry's accident had nothing to do with his death, and did not aggravate his pre-existing arteriosclerosis. (A. 34, 40). Mrs. Embry again presented substantial medical evidence to the contrary. (A. 36).

The jury did not return a general verdict, but returned a special verdict which stated:

> "We, the Jury, find the death of E. Ned Embry was not proximately caused by the accident of May 23, 1963." (A. 53).

Mrs. Embry appealed to the Court of Appeals, which affirmed the district court. (A. 17). Its opinion attempts to justify the permitted relitigation of the fact issue pertaining to the accidental aggravation of Embry's arteriosclerosis and the accidental cause of his death by holding that an additional fact issue was presented in this action pertaining to the dormancy of Embry's disease:

> "We are of the opinion that the issues presented for determination by the jury were:
>
> "Was the advanced arteriosclerosis disease of Embry's coronary arteries, which caused the infarct, dormant at the time of the accident; *and did the accident aggravate or energize such dormant disease*, or was such disease advanced, active, progressive, and energized prior to and at the time of the accident." (A. 41, 451 F.2d at 484). (Our emphasis).

At another point in its opinion, the Court of Appeals ignores the primary issue regarding "aggravation" of the disease, and appears to consider the "dormancy" of such disease as the sole issue (A. 28), although the opinion later recognizes both were submitted to the jury in this action. (A. 41).

The opinion below, thus, failed to give any binding effect to the prior state court judgment that the accident did aggravate Embry's pre-existing disease, and did accelerate, precipitate and cause his death. This fact issue was the major focus of the evidence by both parties in this subsequent action, as well as the prior action. We believe this resulted in a denial of full faith and credit required by 62 Stat. 947, 28 U.S.C. § 1738.

The issue of whether Embry's arteriosclerosis was "dormant" was not involved nor determined in the prior state court action. But Kansas law is clear that advanced arteriosclerosis is considered "dormant" as a matter of law in determining benefits under accidental death clauses. The failure of the court below to apply that law denies Mrs. Embry her rights under the Rules of Decision Act, 62 Stat. 944, 28 U.S.C. § 1652.

REASONS FOR GRANTING THE WRIT

I. Whether the Full Faith and Credit Clause of 28 U.S.C. § 1738 Includes the Doctrine of Collateral Estoppel, Raises an Important Question of Federal Law Affecting All Federal Courts, Which Should Be Definitively Determined by This Court.

The Court of Appeals refused to recognize in this action the binding nature of a fact adjudication by the state court that Embry's accident aggravated his pre-existing arteriosclerosis, and that his death was "caused by, precipitated and accelerated by" the accident. The Court

of Appeals recognized that such issue was of major significance in the present action, but refused to accord it full faith and credit simply because an additional and separate issue relating to "dormancy" of Embry's disease was presented for the first time in this action.

The full faith and credit clause requires that the state court judgment be given the same effect in any Federal court as that which it has "by law or usage in the courts" of Kansas. In Kansas, death from accidental aggravation of a dormant disease is regarded "as being caused solely by the injury, so as to render insurer liable therefor, even though the death . . . might have resulted at a later period regardless of the injury, and even though the accident would not have had such an effect on a normal person." *Williams* v. *Benefit Trust Life Ins. Co.*, 200 Kan. 51, 55, 434 P.2d 765, 769 (1967).[4] The same case makes clear that the fact issues of "aggravation", and "dormancy", of the disease are separate issues, since the two issues were presented to the jury by separate special interrogatories. (200 Kan. at 56, 434 P.2d at 769-770).

The Kansas Supreme Court holds that any "fact . . . directly in issue and judicially determined in a former suit is conclusively settled by the judgment. . . ." *Lyon* v. *Harrison*, 127 Kan. 318, 273 Pac. 429 (1929). Clearly the Kansas courts would give conclusive effect to the state court judgment that Embry's accident aggravated his disease, and caused and accelerated his death, in any future action between the parties. Yet Mrs. Embry, in this action, was required at great expense to relitigate that very fact issue, and the jury was permitted to make a contrary finding on that issue. The full faith and credit clause was intended to prohibit that result.

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4. The holding was made with regard to an accidental disability clause of the same type as the accidental death clauses involved in this action.

The progenitor of 28 U.S.C. § 1738 was enacted by the First Congress in 1790, 1 Stat. 122. This Act extended the rule of the full faith and credit clause of the Constitution (Art. IV, § 1) to all courts, federal as well as state. *Mills* v. *Duryee*, 7 Cranch 481 (1813); *Davis* v. *Davis*, 305 U.S. 32 (1938). The Act has been applied to a variety of cases and questions. E.g., *American Surety Co.* v. *Baldwin*, 287 U.S. 156 (1932); *Milwaukee County* v. *White Co.*, 296 U.S. 268 (1935); *Durfee* v. *Duke*, 375 U.S. 106 (1963); *Durlacher* v. *Durlacher*, 123 F.2d 70 (9 Cir. 1941), cert. denied, 315 U.S. 805; *Wayside Transp. Co.* v. *Marcell's Motor Express, Inc.*, 284 F.2d 868 (1 Cir. 1960); *Porter* v. *Wilson*, 419 F.2d 254 (9 Cir. 1969), cert. denied, 397 U.S. 1020.

The very terms of the statute appear to require federal courts to give full faith and credit to state court judgments deciding issues of fact between the parties, although the second action may involve a different cause of action. For the full faith and credit to be given is that same credit which the judgment has "by law or usage in the courts of such State . . .". By this clause, local doctrines of *res judicata* become a part of national jurisprudence, and therefore federal questions. *Riley* v. *New York Trust Co.*, 315 U.S. 343, 349 (1942).

In Kansas, wherein the prior judgment against Equitable was rendered, collateral estoppel is applied with vigor to prior judgments. In *Lyon* v. *Harrison*, 127 Kan. 318, 273 Pac. 429 (1929), the Kansas Court held:

> "The general rule is that a fact or question directly in issue and judicially determined in a former suit is conclusively settled by the judgment therein and cannot be reiitigated between the same parties or their privies in the same or any other court upon the same or a different cause of action. . .

> "It is not material that the second suit differed from the first as to form or cause of action, where the right, question or fact was put in issue and was definitely determined in the first action." (Syllabuses 1 and 2 by the Court).

The clear import of *Johnson* v. *Muelberger*, 340 U.S. 581 (1951), is that full faith and credit must be given to a prior judgment although the second suit is on a cause of action different from that involved in the first, where the laws of the state wherein the first judgment was rendered make the first determination binding. This Court held that a Florida divorce decree could not be collaterally attacked in a New York state court by the daughter and legatee of the deceased divorced father. Since the state courts of Florida would make the divorce decree binding on the daughter, the New York courts were required to do likewise. This Court stated:

> ". . . From judicial experience with and interpretation of the clause, there has emerged the succinct conclusion that the Framers intended it to help weld the independent states into a nation by giving judgments within the jurisdiction of the rendering state the same faith and credit in sister states as they have in the state of the original forum. The faith and credit to be given is not to be niggardly but generous, full." (340 U.S. at 584).

However, that case involved a jurisdictional attack on the validity of the total divorce judgment, not, as here, an attempt only to relitigate a fact issue previously decided. See also *Chicago, R.I. & P. R. Co.* v. *Schendel*, 270 U.S. 611, 617 (1926); *Sutton* v. *Lieb*, 342 U.S. 402 (1952).

Thus, although this Court has not definitively stated that the doctrine of collateral estoppel, as such, is included in the full faith and credit clause, the language of the stat-

ute, and the interpretation given it, appear to require that result. This, indeed, is the holding of those few lower courts which have specifically considered the question. As stated by the Court of Appeals for the Third Circuit in *United States* v. *Silliman*, 167 F.2d 607, 620-621 (3 Cir. 1948), cert. denied, 335 U.S. 825:

> ". . . The full faith and credit clause 'compels that controversies be settled so that where a state court has jurisdiction of the parties and subject matter the judgment controls in other states to the same extent as it does in the state where rendered.' Therefore, this decree prevents the litigation of a matter already determined in New York in the courts of another state *for the collateral estoppel division of res judicata is included within that clause.* And, although judicial proceedings in the Federal Courts were not explicitly included within the language of the Constitution, it has been held by the Supreme Court that full faith and credit must be afforded to a state court's judgment when brought into relevancy in a Federal tribunal." (Our emphasis).[5]

Professor Vestal, to promote clarity, has divided judgment preclusion into claim preclusion (bar and merger) and issue preclusion (collateral estoppel). He takes the view that full faith and credit requires "the same preclusive effect . . . in terms of issue preclusion, claim preclusion, the parties or persons covered, and the issues involved" as that given in the state wherein the first judgment was rendered. Vestal, "The Constitution and Preclusion/Res Judicata", 62 Mich. L. Rev. 33, 38 (1963). If this be so, the Court of Appeals doubly failed to give full faith and credit: (1) It failed to delineate the separate

5. In accord are *Caterpillar Tractor Co.* v. *International Harvester Co.*, 120 F.2d 82 (3 Cir. 1941), and *Williams* v. *Ocean Transport Lines, Inc.*, 425 F.2d 1183 (3 Cir. 1970).

issues of "aggravation" and "dormancy", and it then (2) failed to give full faith and credit to the state court judgment adjudicating the fact issue of "aggravation". For Kansas recognizes the separateness of these issues, *Williams* v. *Benefit Trust Life Ins. Co.*, 200 Kan. 51, 56, 434 P.2d 765, 769-770. Full faith and credit requires that what the State has separated, a Federal court cannot join together.

In a later study, Professor Vestal vividly describes the increasing importance of issue preclusion under collateral estoppel in the federal courts. Vestal, "Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts," 66 Mich. L. Rev. 1723 (1968). He rightly observes that "[t]he law of preclusion is in a state of flux at the present time", and that "[i]n federal courts there has been uncertainty about the law of preclusion to be applied." 66 Mich. L. Rev. at 1749, 1750. He further suggests an urgent need for federal courts to use a "vital, growing concept of preclusion" and that "[a]nything less would be an abdication of the federal courts' leadership role," in view of overloaded court dockets and complexity of modern litigation. 66 Mich. L. Rev. at 1750, and 1723-1724.

The importance of properly applying collateral estoppel was noted by this Court in *Ashe* v. *Swenson*, 397 U.S. 436, 443 (1970), a criminal case:

> "'Collateral estoppel' is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. . . ."

Moreover, the rule of collateral estoppel "is not to be applied with the hypertechnical and archiac approach of a 19th century pleading book, but with realism and rationality." *Ashe* v. *Swenson*, supra, at 443.

Petitioner suggests it is appropriate for this Court to decide definitively that this important rule of our judicial system is, indeed, a part of the requirement of the full faith and credit clause, so as to give clarity and direction to both federal and state courts in this area so essential to efficient court administration.

Although the Court of Appeals' opinion recognized that a major fact issue in this case was whether the accident aggravated Embry's disease, it declined to give full faith and credit to the state court judgment, merely because another issue relating to dormancy of the disease was presented for the first time. This holding totally eviscerates the principle of collateral estoppel. If the presence of a new issue in a subsequent case involving a different cause of action is sufficient to justify ignoring a judicial fact determination on another issue common to both actions, the benefits encompassed by collateral estoppel are destroyed. In effect, a prior judgment would, in that event, be binding only when all issues common to both actions were previously decided.

It is sufficient to say this result is contrary to the terms of the full faith and credit clause, since Kansas recognizes the conclusive effect of any fact determination in any future action between the parties. The limited, unrealistic concept of issue preclusion applied by the Court of Appeals does not meet the full faith and credit test. The evidentiary Record in this case (the printed Appendix in the Court of Appeals), demonstrates the resulting unwarranted expense and delay of relitigation caused to the parties, and to the judicial system. That this action was filed in state court and removed to federal court serves

to emphasize the discrimination against Mrs. Embry solely as a result of being in federal court.

The Court of Appeals' lengthy recitation of conflicting evidence on the causation issue, largely immaterial to the legal issues before it, appears to evince a distrust of the state court judgment on the issue of causation. The opinion pointedly omits significant portions of testimony from Mrs. Embry's medical witnesses. (R. 179-182, 224-227). But the very purpose of the full faith and credit clause was to prevent second-guessing of this sort, no matter how "wrong" the first judgment is thought to be.

A definitive ruling on this question would tend to have the salutary effect of preventing relitigation of issues in overburdened federal courts, and would provide direction and clarity now lacking. From petitioner's standpoint, it would insure to her a valuable right granted by a statute of basic importance in our federal-state system of government and law.

II. The Failure of the Court of Appeals to Apply Applicable Kansas Law That Arteriosclerosis Is a "Dormant" Disease Is in Violation of the Rules of Decision Act, Which Has a Widespread Impact in Kansas and Other States Affecting All Insurance Policies Containing Accidental Indemnity Clauses.

The Court of Appeals held that the question of dormancy of Embry's arteriosclerosis was a jury question (A. 41), despite the fact that Embry, prior to the accident, appeared to be in excellent health and was not disabled in any way. (R. 89-96). This holding failed to apply Kansas law that arteriosclerosis, though progressive, is dormant in the context of insurance law.

In *Williams* v. *Benefit Trust Life Ins. Co.*, 200 Kan. 51, 434 P.2d 765 (1967), the Kansas Court, in defining what is a dormant disease, quoted with specific approval

a leading decision on the question, *Hooper v. Insurance Co.*, 166 Mo. App. 209, 148 S.W. 116 (1912), which held that accidental aggravation of advanced arterial disease in an otherwise healthy and non-disabled insured, resulting in death, requires the insurer to pay accidental death benefits. The admitted fact that the disease was progressive in the sense that death therefrom could have occurred at any time is insufficient to avoid liability if an accident has aggravated the disease and thus caused death to occur sooner:

> " 'Notwithstanding Hooper was fatally diseased in heart and brain, and notwithstanding his death was from apoplexy, yet if he accidentally fell in the car and ruptured a blood vessel, which caused the apoplectic stroke, his death would be accounted as accidental. For, if a man is so afflicted that he will die from such affliction, within a few hours, yet if by some accidental means his death is caused sooner, it would be a death from accident.' "[6]

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6. Many other states, including states in the Tenth Circuit, follow the same rule. E.g., *Whitlock* v. *Old American Insurance Company*, 21 Utah 2d 131, 442 P.2d 26 (1968), applying *Hooper*, holds that progressive, terminal cancer is no defense if the accident aggravates the disease and accelerates death.

Specifically applying the same principle to cases of arteriosclerosis are *New York Life Insurance Company* v. *McGehee*, 260 F.2d 768, 773 (5 Cir. 1958); *Richard* v. *Southern Farm Bureau Casualty Ins. Co.*, 128 So.2d 806 (La. App. 1961); *Life and Casualty Ins. Co. of Tenn.* v. *Jones*, 230 Ark. 979, 328 S.W.2d 118 (1959), as a few examples of this widespread line of decisions adhered to in many states.

Although the issue of dormancy of insured's osteoarthritis had been submitted to the jury in the Kansas *Williams* case, this was because insurer had evidence that insured was disabled from the disease prior to the accident, and the insurance policy provided disability benefits. The Kansas Court specifically recognized that the admitted fact insured's osteoarthritis was progressive and would have resulted in disability later, was no defense (200 Kan. at 57, 434 P.2d at 770), thus applying the holding in *Hooper*, which it quoted and approved. Therefore, the fact that Embry's arteriosclerosis was progressive and would have caused death at a later time is no defense to Equitable because the accident aggravated the disease and caused his death, as found by the binding judgment of the state court.

The Court of Appeals pointedly failed to refer to, or apply, the governing Kansas law directly applicable to this case. Its decision violates the mandate of the Rules of Decision Act, 28 U.S.C. § 1652. In doing so, the Court denied Mrs. Embry equal protection of law, resulting in the pernicious discrimination condemned by *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). The Court of Appeals' "convenient mode of brushing aside" Kansas law is a direct "invasion of the authority of the state and, to that extent a denial of its independence." *Erie R. Co.* v. *Tompkins*, 304 U.S. at 78, 79. As to the law of this case, "the authority and only authority is the state, and if that be so, the voice adopted by the state as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word." *Erie R. Co.* v. *Tompkins*, 304 U.S. at 79, quoting Justice Holmes.

With most insurers being in a position to establish diversity of citizenship, it is evident that this case affects millions of citizens who may become entitled to accidental indemnity benefits under life, disability and health and accident policies of every kind. By removing to federal court, insurers can avoid what they consider undesirable law enunciated by the several states.

This Court should stand resolutely against this erosion of the constitutional and statutory rights of its citizens.

CONCLUSION

The posture of this case readily lends itself to a decision on the questions presented. The Court of Appeals' failure to give full faith and credit to the state court judgment is evident from the opinion itself. On the question of dormancy, Kansas law is clearly and unmistakably in conflict with the opinion below.

Whether the doctrine of collateral estoppel is included in the full faith and credit clause of 28 U.S.C. § 1738 is a question of universal, continuing importance to the federal judiciary, which should be definitively decided by this Court, in an era when the complexity of litigation frequently encompasses different causes of action between the same parties, wherein common issues of fact are often presented. And in an age when over-burdened federal courts are filled with cases entirely governed by state law, these basic principles of our federal-state system could well be clarified, redefined and revitalized by this Court in this case.

The Writ of Certiorari should be granted.

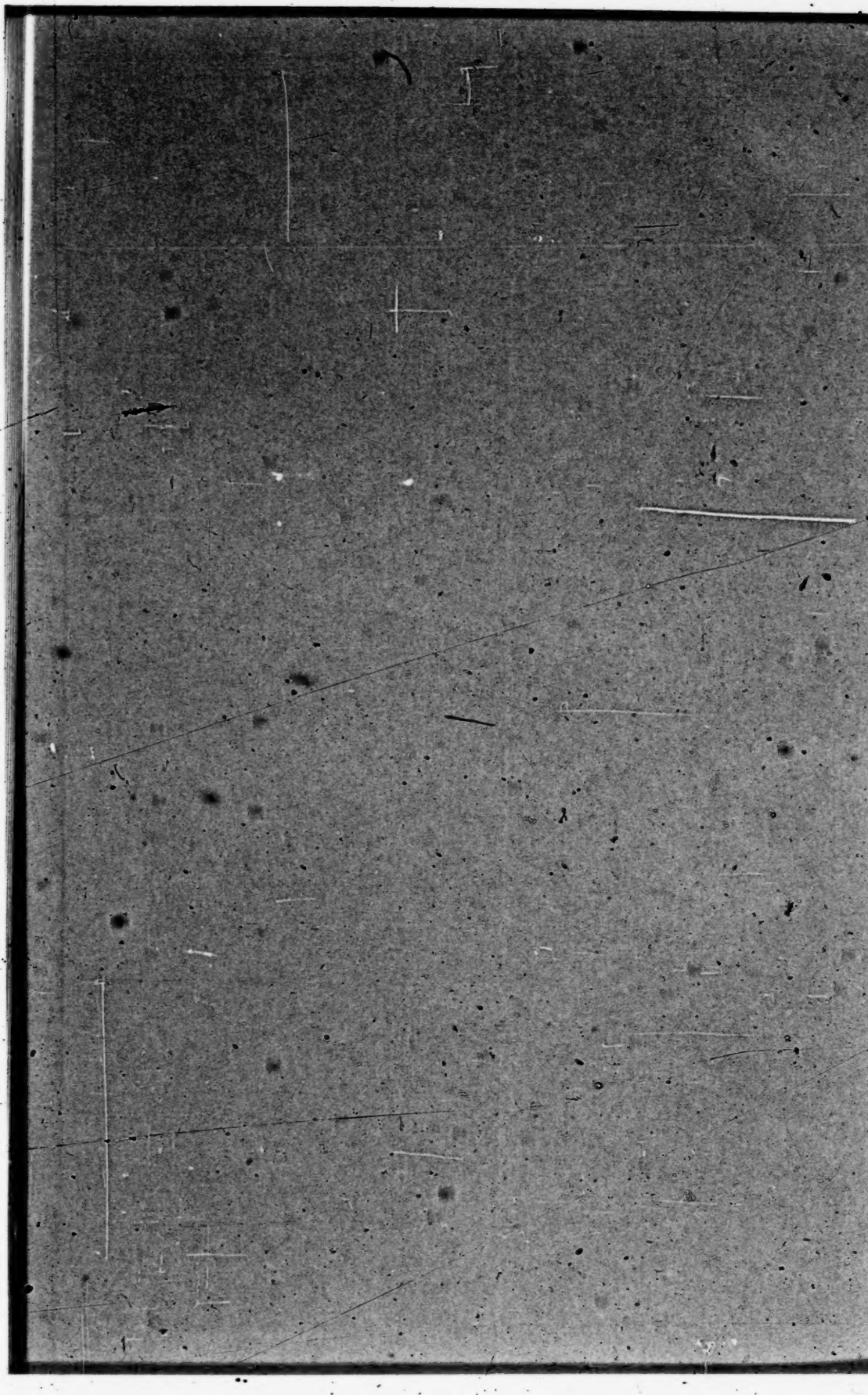
Respectfully submitted,

ROBERT C. FOULSTON
ROBERT N. PARTRIDGE
*GERALD SAWATZKY
600 Fourth National Bank Building
Wichita, Kansas 67202
Attorneys for Petitioner

Of Counsel:
FOULSTON, SIEFKIN, POWERS & EBERHARDT
600 Fourth National Bank Building
Wichita, Kansas 67202

February 11, 1972

*Counsel upon whom service is to be made.



APPENDIX 1

OPINION AND JUDGMENT OF THE DISTRICT COURT OF RUSH COUNTY, KANSAS, DATED OCTOBER 19, 1967

IN THE DISTRICT COURT OF RUSH COUNTY, KANSAS

BETTY EMBRY, widow of E. Ned Embry, deceased,
Claimant

vs.

EQUITABLE LIFE ASSURANCE SOCIETY,
Respondent

and

HARTFORD ACCIDENT & INDEMNITY CO.,
Insurance Carrier

No. 4444

Memorandum of Court

By agreement of Court and Counsel final argument in this case was held in Larned, Kansas, on June 28, 1967. The case was argued in behalf of the Claimant by Bryan Brainerd, of the firm of Weigand, Curfman, Brainerd, Harris & Kaufman, of Wichita; and in behalf of the Respondent and Insurance Carrier by H. Lee Turner, of the firm of Turner & Balloun of Great Bend, Kansas. Thereafter, trial briefs were furnished the Court by both parties.

Prior to argument this Court had read the file, transcripts and depositions in the case. It has again attempted to review the file carefully before preparing this Memorandum. In this Memorandum there follows a narrative

summary of the evidence. This is an attempt to briefly summarize the highlights and important facets of evidence before the Court, but is not to be construed as the only evidence the Court considered in making its decision. This Court attempted to give proper weight and consideration to all the evidence before it prior to coming to a final conclusion.

NARRATIVE SUMMARY OF EVIDENCE

E. Ned Embry, the decedent, had been a State agency manager for the Respondent. His office was in Wichita. A district office was located in Hays, Kansas. At the time of his death he was 51 years of age. He was a tall, slender athletic type of individual, weighing 190 to 195 pounds. His wife, Betty Embry, is the claimant in this case. She had no independent income and was entirely dependent upon her husband for support.

On May 23, 1963, on his way to Hays to visit the district office there Embry had an automobile accident in Rush County on Highway U. S. 183. Following the accident Embry was taken to LaCrosse where he sought medical help; but none was available. He was then taken to Hays by Anita Halling, an employee of the garage which was employed to get and repair Embry's car. She described him as being "deadly white and sweating quite a bit." He had a hard time getting into her car and could hardly bend. He related to Mrs. Halling that "he hit that steering wheel full force", and often indicated he hurt in the chest and heart area.

The statement of Dr. Wm. M. Brewer, M.D. of Hays, Kansas (Ex. 6), says Embry resented having medical attention, insisting he sustained no injuries and had no need of medical care or examination and that the same was a waste of time. Embry agreed to rest and did rest for a short time in a Hadley Hospital bed. His blood pressure

was 180/100 when he went to bed and it was the same when he departed from the hospital two and one-half hours later.

Embry was taken to Wichita that afternoon, arriving at his home about 7:00 P.M. After arriving home his back hurt him to a point that he could not lie down. He had pain in the back and over his chest to which he attributed to having broken the steering wheel of his car in the accident.

Embry returned to work on Monday, May 27. He usually went later and returned earlier than usual. He made a business trip to Homestead, Virginia, with his wife. They stopped at Lawrence, Kansas, and visited a daughter. There he saw an osteopath and acquired some medicine (Maalox) for indigestion. His physical condition was poor and he complained of pains in his chest. Embry would often wake up during the night and sit on the bed, complaining of indigestion. Mrs. Embry observed bruises on his chest consisting of black and blue marks.

Embry went to see Dr. Anthony F. Rossitto, M.D. on May 24, 1963. He complained of low back pain because of his auto accident. Dr. Rossitto found no evidence of any external injury and noted his heart was normal in rate. No X-ray examination was made because Embry was nervous and tense. He was given medication and sent home. Embry returned May 27, 1963, and again on May 28. No objective findings were made; but he complained of low back, of neck, and also shoulder pain. The fluoroscopic examination revealed no broken bones, dislocations or soft tissue structure problems of the shoulder or back of sufficient importance for X-ray study. Dr. Rossitto is a member and a fellow of the American Board of Radiology, and practiced since 1933.

Embry collapsed and died in front of the Central Building in downtown Wichita shortly after the lunch hour on June 24, 1963. At the time he was delivering a personal check to a person with offices in the Schweiter Building in downtown Wichita.

Dr. Karl Neudorfer, M.D., a pathologist at St. Francis Hospital, and a member, diplomate and fellow of the American College of Pathologists, performed an autopsy on Embry on June 25, 1963. He concluded the primary cause of death was an occlusion of the right coronary artery with an infarct in the posterior wall of the left ventricle of the heart.

When Dr. Neudorfer examined the heart he found evidence of an old infarct which had healed in the muscle of the anterior wall of the left ventricle of the heart. He stated this was at least more than five weeks old because it usually takes that length of time for an infarct to heal and be replaced by scar tissue.

The examination revealed considerable evidence of arterial sclerotic disease in advance stage. Embry was a prime subject for sudden death at any time. Dr. Neudorfer found no evidence of trauma or contusion to the heart and concluded, "I do not believe that it has any connection between the automobile accident and his fatal heart attack." (T. 103) However, Dr. Neudorfer would not say there was absolutely no connection between the auto accident and the trauma Embry suffered and the coronary occlusion he suffered and it would depend to a great extent on the severity of the blow he received, among other things, which included his arterial sclerotic disease, congestion of the spleen, kidneys and lungs. (T. 116)

Dr. Neudorfer stated that a trauma to the chest wall may precipitate a coronary (T. 118) and further concluded that it was probable that a person who suffers one coronary

occlusion with an infarct is exposed to a greater degree to the development of another coronary occlusion and infarct than one who had never suffered such a condition in the first place. (T. 123) In this connection Dr. Neudorfer noted that the method of treatment of patients who have suffered heart attacks was to advise them to rest and take it easy and not work so hard. He felt this may have a bad effect rather than a good one, as it is well known that people do suffer heart attacks more frequently while at rest than at doing something. He attributes this to the fact that the lowering of the blood pressure while at rest and the consequent less vigorous supply of blood or circulation to the heart muscle has something to do with the development of the heart attack again. (T. 124)

Dr. Gary B. Wood, M.D., practicing as an internist in Wichita since 1951, testified as an expert in this case for the claimant. He was of the opinion

> "that the eventual death, at which time there was a demonstration of a coronary thrombosis and myocardial infarction, was related to the injury which he sustained at the time of the accident." (T. 63)

He stated he felt that there was an impact on the chest wall in the accident; that Embry's general vigor was below average and was restricted and his color was bad. Dr. Wood stated that the autopsy report indicated sections from the coronary arteries showed the right coronary artery to be completely occluded by a recent thrombus composed of the cellular elements of the blood and fibrin. He further indicated that this area of the heart muscle had beginning infiltration with polymorphonuclear leukocytes and other inflammatory cells, and that there were deposits of fibrous connective tissue within the myocardium. From this he stated that he believed that the coronary thrombosis and myocardial infarction did not occur on the date

of death because of the presence of microscopic cells which the pathologist described as fibrous connective tissue. Therefore, it was some days or even as long as four weeks prior to the date of death. Dr. Wood interpreted the sudden death as a cardiac standstill which arose from interference with the impulse timing center of the heart, which is a condition which may occur in any form of arterial sclerosis affecting the coronary arteries whether there has been a coronary thrombosis or not. (See T. 66 to 69) Dr. Wood believed the immediate death was caused by the stopping of the impulse tissue in the heart. This in turn comes about as a result of deficient oxygen supply to at least some part of the heart muscle, particularly the portion of the heart muscle which contains the impulse conducting tissue. Where a bruising to the heart muscle is present there may be significant bruising of tissues around the coronary arteries and it is possible that there may have been a prolonged formation of blood clot in the right coronary artery without the pathologist's being able to demonstrate it. (T. 78-79)

When asked if the accident contributed to Embry's death, Dr. Wood said,

> "... that it probably contributed to his death because of the uniformity of his clinical appearance for nearly four weeks' time which could not be accounted for by any other information we have." (T. 80)

Dr. Wood said his opinion was based on what he considered reasonable medical certainty.

Dr. Wm. L. Hayes, M. D., testified as an expert for the Respondent. Dr. Hayes is a member of American Board of Internal Medicine and has a special interest in cardio-vascular diseases. He was of the opinion,

> " . . . that the automobile accident and the injury he (Embry) sustained there had no connection with the coronary occlusion and myocardial infarction that ultimately brought about his death a month later." (T. 132)

As reasons for his opinion Dr. Hayes said first of all, in his experience he had never heard, seen or read about, or been presented a case of myocardial infarction due to coronary occlusion that could be shown to be caused by a non-penetrating injury to the chest. Dr. Hayes also said he had made some surveys of medical literature and his surveys did not reveal any convincing evidence to him that such a thing could occur.

Both the direct examination and the cross-examination revealed the sources of medical literature which Dr. Hayes had surveyed. The examinations were exhaustive as well as informative to the Court, and while there were authorities that discussed steering-wheel accidents, Dr. Hayes did not believe that Embry suffered this kind of accident which resulted in a non-penetrating cardiac injury because the pathologist found no evidence of such an injury. The following testimony is typical:

> "A. Dr. Friedberg says 'A frequent cause of non-penetrating cardiac injury is the well publicized steering-wheel accident.' Now, we have no evidence that Mr. Embry had non-penetrating cardiac injury. The pathologist testified there was no evidence of this when he did the autopsy. (T. 154).
>
> "Q. But you do recognize that Dr. Friedberg did make reference to such a situation, don't you?
>
> "A. He made reference to non-penetrating cardiac injury, yes. He made reference to non-penetrating cardiac injury, he did not in this paragraph specify coronary occlusion and myocardial infarction as result-

ing from a non-penetrating cardiac injury, which is the point in this case, I think.

"Q. All right. Doctor, at the bottom part of that page Dr. Friedberg stated, and I quote: 'Serious contusion and even rupture of the heart often occurs without any significant visible external injury of the chest wall and without fracture of the ribs. In fact, in the series of 250 non-penetrating chest injuries reported by Arenberg, the greater cardiac damage occurred among the cases with no rib fracture. Conversely, bilateral multiple fractured ribs were usually unaccompanied by cardiac damage.'

"And continuing on the next page: 'And among the 152 cases of ruptured heart following non-penetrating injuries of the chest assembled by Bright and Beck, evidence of fractured ribs was found only in 58.'

"You are aware that Dr. Friedberg made that statement, aren't you?

"A. Yes.

"Q. Do you disagree with that? (T. 155)

"A. No.

"Q. Continuing in the following paragraph, are you aware that Dr. Friedberg expressed this statement: 'It may be that the diseased human hearts are similarly more susceptible to non-penetrating blows, but pre-existing cardiac disease is by no means as important a pre-disposing factor as in the cases of cardiac injury following unusual and severe physical strain.'

"Do you disagree with that, Doctor?

"A. No.

"Q. On the next page, where Dr. Friedberg states, and I quote: 'The pericardium and myocardium are most frequently injured by blunt injuries of the chest.'

"Do you disagree with that statement, Doctor?

"A. You have quoted his statement there, I think you—

"Q. All right. To continue, if you think it's significant, 'The valves and their attachments are most commonly said to be torn by an unusual physical effort.'

"Do you disagree with that statement?

"A. No." (T. 156)

Other lay witnesses who testified included Embry's daughter, Mrs. Jane E. Wood; John LeBasquet, a friend; and Fred E. Meisinger, a fellow-employee. Their testimony was quite general.

The Examiner in preparing his award related many facts, none of which this Court finds inconsistent with its own narrative, and for that reason this Court adopts the Examiner's Summary of Evidence by reference and makes it a part hereof. Also, the stipulations of the parties as recited in the Examiner's award are adopted and made a part hereof.

THE ISSUE

The Examiner on Page 6 of the transcript put the issues as follows:

"Did the decedent meet with personal injury by accident arising out of and in the course of his employment, resulting in his death upon the date alleged . . . (also) the dependency, and the amount of compensation to be allowed or to be paid?"

This Court likes to think that the real issue in this case is whether or not there is a causal relation between the trauma Embry experienced when he had his automobile accident on May 23, 1963, and the cause of his death which took place June 24, 1963. If there was no causal

connection the claimant is not entitled to recover; but if the decedent's death was hastened, or precipitated, or his physical condition aggravated and worsened by reason of the injuries he sustained May 23, 1963, then the claimant should recover.

FINDINGS OF FACT

1. Betty Embry, surviving spouse of E. Ned Embry, was entirely and wholly dependent upon her husband, and was his sole dependent on May 23, 1963, and on June 24, 1963.

2. The automobile accident in which Embry was involved on May 23, 1963, arose out of and in the course of his employment with Equitable Life Assurance Society, the Respondent.

3. The injury Embry sustained in the automobile accident on May 23, 1963, aggravated a prior existing physical condition, and accelerated and precipitated his death on June 24, 1963.

4. The death of Embry on June 24, 1963, was caused by, precipitated and accelerated by the accidental injury Embry suffered on May 23, 1963. In this connection this Court believes the claimant successfully met the burden of proof, which was her obligation in any event.

CONCLUSIONS OF LAW

Because of the foregoing evidence and findings of ultimate facts this Court enters an award in favor of the claimant, Betty Embry, and against the respondent and its insurance carrier, in the sum of $15,0000.00, payable as provided by law. Mrs. Embry is also allowed $600.00 for funeral expenses. This Court understands the Respondent has paid all medical and hospital bills mentioned in the stipulation; but in any event the same are allowed and

ordered paid by the Respondent. Likewise, all costs are taxed to the Respondent.

This Memorandum can serve as the Journal Entry, in this matter. Therefore, the effective date of the award will be the date this Memorandum is filed with the Clerk of the District Court of Rush County, Kansas.

Executed at Larned, Kansas, this 19th day of October.

/s/ Maurice A. Wildgen
District Judge

BEFORE THE WORKMEN'S COMPENSATION DIRECTOR OF THE STATE OF KANSAS

No. 48,058

BETTY EMBRY, widow of E. NED EMBRY, deceased,
Claimant,

vs.

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Respondent,

and

HARTFORD ACCIDENT AND INDEMNITY COMPANY,
Insurance Carrier.

Award

This claim came on for hearing before Lee R. Meador, Examiner for the Workmen's Compensation Director of the State of Kansas, at Wichita, Kansas, on July 11, 1964, by deposition of Gary B. Wood, M.D. on February 9, 1966, by deposition of Karl M. Neudorfer, M.D. on March 24, 1966, by deposition of William L. Hayes, M.D. on October 12 and November 11, 1966 by proceedings before the Examiner

on December 23, 1966, by deposition of Mrs. Anita Hooling, taken on May 20, 1966, and by deposition of Anthony F. Rossitto, M.D. taken on August 5, 1966. Both the respondent and claimant submitted briefs and argument relative to the matter, the last being submitted by the claimant on February 7, 1967.

APPEARANCES

Claimant, Betty Embry, appearing in person and by her attorneys, Weigand, Curfman, Brainerd, Harris and Kaufman, 830 First National Bank Building, Wichita, Kansas, by Mr. Byron Brainerd.

Respondent and insurance carrier appearing by their attorneys, Adams, Jones, Robinson and Manka, Colorado, Derby Building Wichita, Kansas, by Mr. Clifford Malone.

STIPULATIONS

It was stipulated by the parties that they waived the right of hearing in Rush County in which the accident occurred and consented that the matter be heard in Wichita, Sedgwick County, Kansas.

It was alleged by Betty Embry, widow of E. Ned Embry, deceased, that the decedent met with personal injury by accident on May 23, 1963, resulting in his death on June 24, 1963. The respondent denied that the decedent met with personal injury by accident on the date alleged, or that it resulted in his death on the date alleged; nor did the respondent admit that the decedent's alleged accidental injury and resulting death arose out of and in the course of his employment.

The respondent did admit notice; that the relationship of employer and workman existed; that the parties were governed by the Kansas Workmen's Compensation Act; that claim was made as required by law; that the

Hartford Accident and Indemnity Company was the insurance carrier.

It was agreed that the decedent's annual average wage was sufficient to entitle his wife, the claimant, to the maximum benefits under the Workmen's Compensation Act if she were entitled to recover.

No compensation had been paid, but the respondent, admitted paying Hadley Memorial Hospital and Rehabilitation Center the sum of $5.00 and Dr. Rossitto the sum of $20.00, Dr. William M. Brewer $5.00 and Dr. A. A. Mailhait $10.00.

The funeral benefit had not been paid. Funeral director was the Gill Mortuary and the total bill for funeral services was $1,772.86 and had been paid by the claimant.

The death certificate covering Mr. Embry, as well as the report of the autopsy performed at St. Francis Hospital, were admitted in evidence by stipulation of the parties.

The questions involved in this case are: Did the decedent meet with personal injury by accident arising out of and in the course of his employment, on May 23, 1963, which resulted in his death on June 24, 1963; the dependency of the claimant, and the amount of compensation to be allowed, if any.

SUMMARY OF THE EVIDENCE

The evidence disclosed that E. Ned Embry was fifty-one years of age, six feet three inches tall, weighed 190-195 lbs., and was an athletic type individual. He had been, at the time of his death and for several years prior thereto, the agency manager for the Equitable Life Assurance Society of the United States with offices in

Wichita. He was the agency manager for the state of Kansas.

Betty Embry was his wife; there were no minor or dependent children. Mrs. Embry had no independent income and was entirely dependent upon her husband for her support.

On May 23, 1963, E. Ned Embry, the decedent, was on his way to Hays, Kansas, in his automobile, to visit the district office located in that city. On the way he had an automobile accident when his automobile left the road and hit the bank of a ditch. He was thrown violently against the steering wheel and up against the roof of the car, and as a result suffered injuries to his chest and upper body, although no bones were broken. He was not hospitalized for his injuries, although he went to the hospital in Hays and was examined there. He refused to stay in the hospital and went back to Wichita, arriving home about 7 o'clock in the evening.

From that time until June 24, 1963, the date of his death, he complained of pain in his chest; his apparent physical condition was not good; his wife stated that he looked terrible and that his color was not good; his back hurt him and he complained of pain by pressing his hand on his chest, that he would wake up in the night and sit on the side of the bed complaining of indigestion. During this time he had bought some medicine (Maalox) for indigestion which he continued to use up until the date of his death. His wife further stated that he went down to the office a little later in the morning than usual and came home earlier, rested before dinner and went to bed early, something which he had never done previously.

On June 24, 1963, shortly after the lunch hour, the decedent left his office in the Central Building to deliver a personal check to someone in the Schweiter Building,

and collapsed in front of the Central Building. He was dead on arrival at the hospital.

On June 25, 1963, Dr. Carl M. Neudorfer, pathologist at St. Francis Hospital, performed an autopsy on the decedent and concluded that the primary cause of death was an occlusion of the right coronary artery with an infarct in the posterior wall of the left ventricle of the heart. From his examination he concluded that the occlusion was fresh as was the infarct, meaning that he meant only in terms of hours and that the particular infarct could not have been older than twelve hours at the most. Further examining the heart there was evidence of an old healed infarct in the muscle of the anterior wall of the left ventricle of the heart. This infarct was possibly five weeks old in age because it took about that time for an infarct to be completely healed and be replaced by scar tissue. The examination disclosed considerable evidence of arteriosclerotic disease which was in an advanced stage. Because of this situation the deceased would have been a prime subject for sudden death at almost anytime.

Dr. Gary B. Wood, called as a witness on behalf of the claimant, testified that he had read the transcript of the lay testimony in the case, as well as the medical exhibits, autopsy report, etc., and it was his opinion, from all the facts and circumstances, that the accident that the claimant had on May 23, 1963, was the precipitating cause of his death on June 24, 1963.

Dr. Carl M. Neudorfer testified that he did not feel that the accident that the claimant had caused his death, as did Dr. William L. Hayes. Dr. Rossitto's testimony, by deposition, was to the effect that he saw no evidence of injury to the decedent's chest wall when he examined him between the 23rd of May and the 24th of June.

FINDINGS OF FACT

It is found in addition to the stipulations of the parties, that the decedent suffered personal injury by accident arising out of and in the course of his employment with the respondent on May 23, 1963, which accelerated or precipitated his death on June 24, 1963. The examiner is aware that both Dr. Neudorfer and Dr. Hayes testified that the accident did not, in their opinion, cause the decedent's death, but Dr. Gary Wood testified to the contrary, and the evidence relative to the decedent's physical condition from the time of the accident up to his death would lead one to believe that there must be a connection, certainly too much to be called a coincidence.

It is further found that Betty Embry is the widow of E. Ned Embry, his sole dependent, and that she was entirely dependent upon him for her support.

AWARD

Based on the evidence and the finding of dependency made, an award is entered in favor of said dependent, Betty Embry, in the sum of $15,000.00, payable at the rate of $42.00 per week, and a funeral allowance of $600.00 which shall be paid to the claimant. The medical and hospital bills, which have already been paid by the respondent, are allowed.

Costs in this matter are assessed as follows: $298.25 to Court Reporting Service, P. O. Box 205, Wichita, Kansas, and shall be paid by the respondent.

Dated this 3rd day of April, 1967.

/s/ Lee R. Meador
Lee R. Meador, Examiner

OPINION OF THE COURT OF APPEALS FOR THE TENTH CIRCUIT FILED OCTOBER 21, 1971

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SEPTEMBER TERM, 1971

BETTY N. EMBRY,
Plaintiff-Appellant,
v.
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Defendant-Appellee.

No. 535-70

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS
(D. C. No. W-3963)

Gerald Sawatzky (Robert C. Foulston, Robert N. Partridge; Foulston, Siefkin, Powers & Eberhardt, of Counsel, on the brief) for plaintiff-appellant.

Ronald M. Gott (Wesley A. Weathers; Lilleston, Spradling, Gott, Stallwitz & Hope, of Counsel, on the brief) for defendant-appellee.

Before PHILLIPS, MURRAH and BREITENSTEIN, Circuit Judges.

PHILLIPS, Circuit Judge.

In February 1968, Betty N. Embry commenced this action in the District Court of Sedgwick County, Kansas, against The Equitable Life Assurance Society of the United States to recover accidental death benefits under four policies of insurance issued by it to her husband, E.

Ned Embry. She will be referred to hereinafter as Mrs. Embry, or the beneficiary; he, either as Embry or the insured; and it, as Equitable.

The case was duly removed to the United States District Court for the District of Kansas.

From a verdict and judgment in favor of Equitable, Mrs. Embry has appealed.

Embry was the insured and Mrs. Embry the beneficiary in each of such policies. Each of such policies was in full force and effect on May 23, 1963, the date of the alleged accident, and on June 24, 1963, the date of Embry's death.

Mrs. Embry set out her claims in four separate counts. The policies upon which Counts I and II were based provided for double indemnity benefits for death from accident, and insofar as here material were identical, except that the amount of double indemnity benefits was $10,000 in the policy upon which Count I was based and $20,000 in the policy upon which Count II was based.

The double indemnity provision in each of the policies upon which Counts I and II were based, insofar as here pertinent, read:

> "The Society agrees to increase the face amount payable under said policy
>
> to - - - TEN THOUSAND - - - Dollars,
>
> (TWENTY THOUSAND Dollars in the policy upon which Count II was based)
>
> upon receipt of due proof of the Insured's death from accident as defined below, * * *.
>
> "Death from accident means death resulting solely from bodily injuries caused directly, exclusively

and independently of all other causes by external, violent and purely accidental means and ensuing within 90 days of such injuries, but does not include death resulting from or caused directly or indirectly by * * * disease or illness of any kind, physical or mental infirmity, * * *."

The policy upon which Count III was based contained a provision for additional indemnity in the event of the death of the insured by accidental means. Such provision, insofar as here material, read:

"The Society agrees, subject to the provisions hereinafter stated, to increase the face amount payable under said policy

by - - - TEN THOUSAND - - - Dollars,

upon receipt of due proof as hereinafter provided that the death of the Insured resulted solely from bodily injuries caused directly, exclusively and independently of all other causes by external, violent and purely accidental means; provided such death occurred within 90 days after the date of such injuries, * * * and provided further that such death shall not be the result of or caused directly or indirectly by

* * *

"(c) disease or illness of any kind, or physical or mental infirmity; * * *

* * *"

The policy upon which Count IV was based was an accidental death policy. It provided that Equitable would pay Mrs. Embry $50,000 in the event of the accidental death of Embry, subject to the following conditions:

That "accidental death benefits became payable upon receipt of due proof; that the insured "shall have sustained

bodily injury caused directly and exclusively by external, violent and purely accidental means, and within ninety days after said injuries shall have been sustained * * * subject to the limitation that 'No payment shall be made for any loss resulting from or caused directly or indirectly, wholly or partly, by (1) bodily or mental infirmity, * * * or disease or illness of any kind, * * *.'"

Prior to and on May 23, 1963, up to and including June 24, 1963, Embry was employed by Equitable as its State Agency Manager for the State of Kansas. On the former date he was traveling from Wichita to Hays, Kansas, in his own automobile on business for Equitable. His automobile was forced off the road by the driver of another automobile turning it in front of Embry's on an open highway. Embry's automobile ran into a drainage ditch while traveling at a high speed. His chest went forward against the steering wheel, causing the steering wheel to bend and the steering column to break. Embry was able to obtain a ride to La Crosse, Kansas, and was transported from there to Hays by Anita Halling in her automobile.

She testified that when she first saw Embry at La Crosse, he was pale and perspiring freely and had difficulty in getting into her automobile; that on the way to Hays Embry gave her a detailed description of the accident; that when she reached Hays she asked Embry, "Shall I take you to the hospital at Hays?" and he said, "No, take me to the office."

However, at the insistence of Equitable's representative at Hays, Embry was examined by Dr. William M. Brewer of Hays. Embry gave Dr. Brewer a clear, coordinated report of the accident, which indicated he was well oriented. Embry resisted medical attention, saying it was a sheer waste of time. However, on the insistence of the local representative of Equitable, Embry consented to

go to the hospital and rest for a short time in bed for a reading of his blood pressure. Embry had been cautioned against strain, mental or physical, due to the presence of elevated blood pressure. His blood pressure was 180 over 100 when he started his bed rest and the same two and one-half hours later, when he finished resting. Dr. Brewer found the color of Embry's skin to be normal, and no visible evidence of injury nor evidence of shock.

Embry returned to Wichita on the evening of May 23, 1963. On May 24, 1963, he went to Dr. Anthony F. Rossitto of Wichita and complained of lower back and shoulder pains. He returned to Dr. Rossitto on May 27 and May 28. On each of the first and second visits, Dr. Rossitto had Embry disrobe and examined him and found no bruises and no objective signs of injury. On the last visit, Dr. Rossitto found Embry improved so far as his complaints were concerned.

On Monday, May 27, 1963, Embry returned to his office and worked until June 24, 1963, except for a two-week trip he took with Mrs. Embry. He attended a meeting of the Board of Directors of the KU Alumni, of which he was a member, and then went on to The Homestead in Virginia, where he attended an Equitable meeting. In going from Wichita to Lawrence, Kansas, on to Virginia, and back to Wichita, Embry and Mrs. Embry traveled by automobile and he drove part of the time.

On June 24, 1963, while he was standing in front of the Central Building in Wichita talking to a friend, Embry fell to the street and was dead on his arrival by ambulance at the St. Francis Hospital in Wichita.

We shall next refer to a proceeding brought by Mrs. Embry to recover compensation from Equitable under the Kansas Workmen's Compensation Act which was com-

menced and completed prior to the institution of the instant action.

At the hearing on the compensation claim, both parties offered extensive evidence.

In her brief in this court, Mrs. Embry states that she sought to prove in the workmen's compensation case that Embry's "death was caused by the accident in that the accident precipitated Embry's heart attack which occurred prior to his death," and Equitable sought to prove that "the accident had nothing to do with the heart attack and did not cause Embry's death."

The Examiner found for Mrs. Embry, and on April 3, 1967, awarded her workmen's compensation benefits.

Equitable appealed from the Examiner's award to the District Court of Rush County, Kansas, under the provisions of K.S.A. 44-556, which authorizes the District Court to make findings of fact on the evidence introduced at the proceeding before the Examiner and determine questions of law.

The Judge of the District Court of Rush County filed a memorandum opinion. In it, he stated:

> "This Court likes to think that the real issue in this case is whether or not there is a causal relation between the trauma Embry experienced when he had his automobile accident on May 23, 1963, and the cause of his death which took place June 24, 1963. If there was no causal connection the claimant is not entitled to recover; but if the decedent's death was hastened, or precipitated, or his physical condition aggravated and worsened by reason of the injuries he sustained May 23, 1963, then the claimant should recover."

The Court made and set forth therein findings of fact, which insofar as here pertinent, read:

> "2. The automobile accident in which Embry was involved on May 23, 1963, arose out of and in the course of his employment with Equitable Life Assurance Society, the Respondent.
>
> "3. The injury Embry sustained in the automobile accident on May 23, 1963, *aggravated a prior existing physical condition, and accelerated and precipitated his death on June 24, 1963.* (Italics ours.)
>
> "4. The death of Embry on June 24, 1963, was caused by, precipitated and accelerated by the accidental injury Embry suffered on May 23, 1963. * * *"

And he determined that Mrs. Embry was entitled to an award against Equitable of workmen's compensation therefor in the amount of $15,000, plus $600 for funeral expenses, the expenses for medical and hospital bills, and costs. An award of those amounts was made against Equitable on October 19, 1967. It was duly filed with the Clerk of the Rush County District Court. No appeal was taken therefrom and it became final.

In the instant action, after issues were joined by the pleadings, counsel for Mrs. Embry on December 31, 1968, filed a motion for summary judgment, on the ground that Equitable was bound by the findings of fact and the decision by the Rush County District Court in the workmen's compensation proceeding under the doctrine of estoppel by judgment or collateral estoppel; that no genuine issue as to any material fact remained; and that Mrs. Embry was entitled to judgment as a matter of law.

The federal court denied the motion for summary judgment.

After such motion was denied, the instant case was tried and resulted in a verdict and judgment in favor of Equitable. Mrs. Embry, on her appeal, assigned as one of her grounds of error the denial of such motion.

We shall decide that issue at this point in our opinion, for the reason that it will immediately follow that part of our opinion where the pertinent facts with respect thereto are set out.

For the doctrine of estoppel by judgment or by adjudication to be applicable, it is essential that the issue in the workmen's compensation case of whether Embry's death was caused by accident within the meaning of the Workmen's Compensation Act, and the issue in the instant case of whether Embry's death was caused by accident within the meaning of the provisions of the policies were identical.

In Henderson v. United States Radiator Corporation, 10 Cir., 78 F.2d 674 (decided July 3, 1935), at page 675, this court said:

> "The doctrine of res judicata embodies two main rules which may be stated as follows:
>
> "(1) The final judgment or decree of a court of competent jurisdiction upon the merits concludes the parties and their privies to the litigation, and constitutes a bar to a new action or suit upon the same cause of action either before the same or any other tribunal.
>
> "(2) Any right, fact or matter in issue and directly adjudicated, or necessarily involved in the determination of an action before a competent court in which a judgment or decree has been rendered upon the merits, is conclusively settled by the judgment therein and cannot again be litigated between the same parties and their privies, whether the claim, de-

mand, purpose or subject-matter of the two suits is the same or not.[1]

"The principle of the first rule is referred to as 'bar by former judgment,' and the second as 'conclusiveness of judgment.'"[2]

However, the more recent tendency is to refer to the second rule as "collateral estoppel,"[3] but that is only a matter of nomenclature. The principles are not changed.

We assume, since we find no Kansas decisions to the contrary, that the final decision of the District Court of Rush County correctly decided that the facts, as found by it in the workmen's compensation proceeding, established that Embry's death was caused by accident, as that term is used in the Workmen's Compensation Act, arising out of his employment.

The test as to whether Embry's death was accidental within the meaning of the Workmen's Compensation Act was stated by the District Court of Rush County, as follows:

"* * * the real issue in this case is whether or not there is a causal relation between the trauma Embry experienced when he had his automobile accident on May 23, 1963, and the cause of his death which took place June 24, 1963. If there was no causal connection the claimant is not entitled to recover; *but if*

1. Tait v. Western Md. Ry. Co., 289 U.S. 620, 623, 624; Cromwell v. County of Sac, 94 U.S. 351, 352, 353; 46 Am Jur 2d, Judgments, § 396, p. 563; Viles v. Prudential Ins. Co. of America, 10 Cir., 124 F.2d 78, 81; Mid-Continent Casualty Company v. Everett, 10 Cir., 340 F.2d 65, 69; Tidewater Oil Company v. Jackson, 10 Cir., 320 F.2d 157, 160.

2. 46 Am Jur 2d, Judgments, § 397, pp. 563-566.

3. 46 Am Jur 2d, Judgments, § 397, p. 565, and cases cited in note 6 thereto.

the decedent's death was hastened, or precipitated, or his physical condition aggravated and worsened by reason of the injuries he sustained May 23, 1963, then the claimant should recover." (Italics ours.)

But, in the compensation proceeding the District Court of Rush County decided whether Embry's death was accidental within the meaning of the provisions of the Workmen's Compensation Act. Here, the issue is whether Embry's death was accidental under the provisions of the policies, and particularly the provisions thereof excluding from the accidental coverage death caused directly or indirectly by disease or illness of any kind or by mental infirmity. It seems obvious that the issues of fact and law as to whether Embry's death was accidental under the Workmen's Compensation Act and whether it was accidental under the provisions of the policies are not identical, but are separate and distinct issues and do not come within the second rule laid down by the Henderson case, supra.

In Williams v. Benefit Trust Life Insurance Company, 200 Kan. 51, 434 P.2d 765, there was presented to the Supreme Court of Kansas the question of whether an insured's death resulted from accident or from disease. The policy there involved contained the following provisions:

"'I. EXCEPTIONS AND REDUCTIONS

"'(2)(a) "Such injury" [from accident], as the term is used in this policy, is defined as bodily injury brought about by an accidental cause and not otherwise. Bodily injury, fatal or non-fatal, not resulting from accidental cause shall be considered only under the sickness provisions of this policy. (b) Any loss fatal or non-fatal, due wholly or in part to any disease or sickness, * * * shall be classified as sickness and not otherwise.'"

In its opinion the Supreme Court of Kansas further stated, as follows:

> "There appears to be a distinct conflict of opinion between the several jurisdictions of this country as to the extent of an insurer's liability under an accident insurance policy containing provisions similar to those quoted above, where the insured has an antecedent disease or sickness. This conflict of authority is set out in 45 C.J.S. Insurance § 776, p. 813, in these words:
>
> "'It has been held that no recovery can be had for a death or disability, on the ground that it results solely from accidental injury, where the injury aggravates the effect of a preexisting disease or infirmity, or the disease or infirmity aggravates the effect of the injury, and both together cause the death or disability, even though it is thereby caused at a period sooner than it otherwise would have occurred. *On the other hand, it has been held that where the death or disability results from an accidental injury aggravating or rendering active a dormant disease or infirmity, it will be regarded as being caused solely by the injury, so as to render insurer liable therefor, even though the death or disability might have resulted at a later period regardless of the injury, and even though the accident would not have had such an effect on a normal person.*'"

In its opinion the court further quoted with approval from Howe v. National Life Ins. Co., 321 Mass. 283, 72 N.E.2d 425, as follows:

> "'* * * A death caused by bodily injuries accidentally sustained would be within the terms of the policy if the accident, by reason of the frailty or general weakness of the insured, a predisposition to a disease, or the presence of a disease then inactive or

dormant, resulted in a fatal termination, even if this result would not have followed if the injured person was in normal health. * * *' "

In its opinion in the Williams case, the court further stated:

> "Synonyms for the adjective 'dormant' are 'inactive', 'resting', 'passive', 'static', 'quiescent', while its antonym, 'active', has the contrary connotation: 'lively', * * *."

As we see it, the issue here is whether, at the time of the accident Embry was suffering from a passive disease or one that was inactive and static, or whether prior to and at the time of the accident he was suffering from a coronary disease at an advanced stage, which was active, energized, and progressive in character.

Dr. Karl Neudorfer performed an autopsy on the body of Embry on June 25, 1963. Because it will make the remainder of the opinion more understandable, we set out the pertinent parts of the autopsy report in subjoined note 4 hereto.[4]

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4. "DEFENDANT'S EXHIBIT A

St. Francis Hospital
Department of Pathology
Wichita, Kansas
Post-Mortem Examination

Name: Embry, Mr. Ernest N. Date of death: 6-24-63
Age: 51 yrs. Date of autopsy: 6-25-63
Physician: F. J. McEwen, M.D. Prospector: K. M. Neudorfer, M.D.
Hospital No.: DOA Autopsy No.: 159-A-63

Final Anatomic Diagnosis
Primary

Advanced arteriosclerosis of the coronary arteries with complete occlusion of the right coronary artery by thromboaic material.
Recent infarct of the posterior wall of the left ventricle of the heart.
Almost complete occlusion of the first portion of the descending branch of the left coronary artery by an organized and, recanalized thrombus.

Dr. Neudorfer testified by deposition. At the trial, counsel for Mrs. Embry stated he desired to offer part of

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(Footnote 4 continued)

Healed infarct within the anterior wall of the left ventricle of the heart.
Hypertrophy and dilatation of the heart, (550 grams).
Edema of the lungs.
Acute and chronic congestion of the lungs, liver, spleen, and kidneys.
Congestion of the mucosa of the gastro-intestinal tract.
Petechiae within the mucosa of the stomach.
Arteriosclerosis of the aorta, splenic, renal, mesenteric and iliac arteries.

Accessory

Fibrous thickening of the leaflets of the mitral valve and of the cusps of the aortic valve.
Fibrosis of the tips of the papillary muscles.
Focal fibrosis of the myocardium.
Pericardial cyst.
Fatty infiltration of the pancreas.
Nodular hyperplasia of the prostate.

/s/ (Illegible)
Pathologist

FINAL SUMMARY:

The principal finding in this case was the thrombotic occlusion of a coronary artery with recent myocardial infarction. There was advanced arteriosclerotic heart disease with the presence of a healed infarct in the anterior wall of the left ventricle of the heart and enlargement of the heart.

The CAUSE OF DEATH was: acute coronary artery occlusion with myocardial infarction.

This death must be classified as *Sudden Natural Death* and is not related to automobile accident which was sustained by the deceased approximately 4 weeks prior to death.

K. M. Neudorfer, M.D.
Pathologist

GROSS DESCRIPTION

Embry, Ernest K. M. Neudorfer, M.D.

GENERAL INSPECTION:

The body is that of a well developed, well nourished white male, measuring 6' in length and weighing approximately 200 pounds. Arterial embalming has been performed. The external appearance is that of the stated age. The external configuration of the head is within normal limits. The hair is brown and rather short with several streaks of gray. There is marked recession of the hairline in the region of the forehead. The external configuration of the ears is within normal limits. There is a small amount of dried blood present within the left ear. The nasal septum is in the midline. There is no discharge from the

such deposition in support of her case. The deposition was then read to the jury, apparently in its entirety, because

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(Footnote 4 continued)

external nares. The eyes are gray. The pupils are dilated, each one measuring approximately 6 mm in diameter, they are round, equal and regular. The mouth is closed. The lips are pale, dry and not cyanotic. The trachea is in the midline. The thyroid gland cannot be palpated. No lymph nodes are palpable within the cervical region. The neck is obese. There is no fecession of the supraclavicular fossae and no masses are palpated in these areas. There are no palpably enlarged axillary lymph nodes. The external configuration of the chest is within normal limits. There is a small amount of brownish-gray hair covering the anterior chest and abdominal walls. The external configuration of the upper extremities is within normal limits. There are no malformations. There is no clubbing of the fingers and no cyanosis of the fingernail beds. The anterior abdominal wall is rigid. The abdomen is protruding. No scars are present on the abdominal wall. There are no palpably enlarged inquinal lymph nodes. The external genitalia are of normal appearance. The external configuration of the lower extremities, including thighs, legs and feet, is within normal limits. There are no malformations. There is no edema of the ankles or feet. There is no clubbing of the toes and no cyanosis of the toenail beds.

PRIMARY INCISION: The usual "y" shaped incision is made. The fat layer of the anterior abdominal wall measures up to 5 cm in thickness. There is no free fluid within the abdominal cavity. The stomach and small intestine and some of the large intestines are distended. There are no deposits of fibrin on the visceroparietal peritoneum which is smooth and glistening. The pleural cavities contain no free fluid. The lungs are poorly expanded and do not fill the thoracic cages. There are no fibrous adhesions and no deposits of fibrin on the visceroparietal pleura. The pericardial cavity contains a normal amount of yellowish clear fluid. The heart appears somewhat enlarged but the epicardial and pericardial surfaces are free of fibrinous deposits.

HEART: The heart weighs 550 grams. The endocardial surface of the right auricle is smooth and glistening. There are no foci of fibrosis. The foramen ovale is closed. The leaflets of the tricuspid valve show slight focal fibrous thickening. The chordae tendineae are thin. The myocardium of the right ventricle measures 5 mm in thickness. The cusps of the pulmonic valve are thin and translucent and there are no adhesions between the cusps of the commissures. The endocardial surface of the left auricle is smooth and glistening. There are no foci of fibrosis. The leaflets of the iteral valve show slight focal fibrous thickening within the closing edges and bases by deposits of fibrous connective tissue. The chordae tendineae are thin and not fused. There is fibrosis of the tips of the papillary muscles. The myocardium of the left ventricle measures 25 mm in thickness. The cusps of the aortic valve are somewhat thickened by

as set forth in the appendix it embraced direct, cross, and redirect examinations, and neither the appendix nor the

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(Footnote 4 continued)

deposits of fibrous connective tissue. There are Lambl's excressences on the closing edges of the aortic cusps. The ostia of the coronary arteries are narrowed by deposits of calsified atheromatous plaques. There are no adhesions between the cusps at the commissures. Cut sections through all branches of the coronary arteries show an almost complete occlusion of the descending branch of the left coronary artery by organized thrombus. There is a pin point lumen present within this area. The right coronary artery at almost the right edges of the right ventricle is completely occluded by a thrombus of recent origin. The remaining branch and portions of the coronary arteries show advanced arteriosclerotic changes with deposits of calcified material throughout. Cut sections through the myocardium show a healed infarct within the interior wall of the left ventricle of the heart. There is an early infarct within the posterior wall of the left ventricle of the heart, extending through approximately 2/3 of the posterior wall area. The myocardium in this region is reddish-gray, soft and there are what appear to be zones of hemorrhage. There are also scattered zones of fibrosis within other portions of the myocardium.

* * *

MICROSCOPIC DESCRIPTION

Embry, Mr. Ernest — K. M. Neudorfer, M.D.

Heart: Multiple sections taken from the myocardium show in the area of the grossly described early infarction the myocardial fibers to have undergone degeneration and partial necrosis with loss of cross striations and in most instances also loss of the nuclei. There are zones of hemorrhage present within the myocardium in the area. In adjacent regions there is beginning infiltration with polymorphonuclear leukocytes and other inflammatory cells. There are deposits of fibrous connective tissue within the myocardium. In other regions of the myocardium there are scattered infiltrations with chronic inflammatory cells and occasionally there are a few large mononuclear cells and phagocytes which contain yellow-brown granular pigment within their cytoplasm. In the area of the grossly described healed infarct there is complete replacement of the myocardial fibers by dense fibrous connective tissue and scar tissue which contains very widely scattered small elongated or spindle-shaped nuclei. There are groups of myocardial fibers incorporated into the scar tissue, these fibers have lost their cross striations and have small hyperchromatic irregular nuclei. In other regions the myocardial fibers are large. There is fragmentation of the fibers. There is partial loss of cross striations. There are focal deposits of fibrous connective tissue, especially within the interstitial regions where there are also scattered groups of chronic inflam-

record disclosed which part was introduced by Mrs. Embry and which part by Equitable.

Hence, we will next take up the testimony of Dr. Neudorfer, which was to the following purport:

Dr. Newdorfer graduated from the Medical School of the University of Munich, Germany, in 1947. He studied for one year at the Pathological College and Institute at the University of Munich. He engaged in general practice for three years in Germany, and in 1953 he served an internship for one year at Bernert Memorial Hospital in Paterson, New Jersey. In 1954, he came to Wichita, Kansas, and started a four-year residence in pathology. After completing that in 1958, he became the Assistant Pathologist at St. Francis Hospital. In 1956, he left Wichita and went to Ashland, Kentucky, to take the directorship of the laboratory at Kings Daughters Hospital, which was where he was at the time of his testimony.

(Footnote 4 continued)

matory cells. There is interstitial edema and there are focal accumulations of adult fat cells within the interstitial tissue. The blood vessels show thickening of their walls with proliferation of the intimal lining and narrowing of the lumen. Sections taken from the coronary arteries show the right coronary artery to be entirely occluded by a thrombus. Sections from the coronary arteries show the right coronary artery to be completely occluded by a recent thrombus composed of the cellular elements of the blood and fibrin. The lumen is very narrow. The wall is markedly thickened. There is deposition of large amounts of cosinophilic material within the intimal and subintimal layers. There are deposits of calcified material. There are cholesterol clefts. There are infiltrations with lymphocytes and accumulations of large mononuclear cells and phagocytes. There is proliferation of the adventitia which contain numerous groups of densely arranged lymphocytes. Other branches of the coronary arteries show advanced narrowing of the lumen, proliferation of the intima, deposits of calcified material and also proliferation of the adventitia. In many areas the lumina are extremely narrow, however, patent.

* * *"

On June 24, 1963, he had performed more than 2,000 autopsies.

The remainder of Dr. Neudorfer's testimony had the following purport:

When a branch of the coronary artery which carries blood to a particular portion of the heart muscle becomes occluded and the blood supply to that portion of the heart muscle ceases, the tissue of such portion of the heart muscle dies. Such dead tissue is called an infarct. If the person survives his heart attack, then eventually the dead tissue will be replaced by new tissue, grayish in color, and after it becomes grayish in color there is no change. The new tissue, to some extent, will enable the coronary artery to supply the heart with blood.

Dr. Neudorfer found two infarcts in Embry's heart, one a healed infarct in the front wall of the heart, and one fresh infarct in the back wall of the heart. In the old infarct, the dead tissue had been replaced with live tissue. He testified that in his opinion the fresh infarct and the occlusion which caused it occurred within 12 hours before Embry's death, and the healed infarct occurred at least five weeks and probably much longer before his death.

The fresh occlusion and the fresh infarct which it caused were the causes of Embry's death.

Dr. Neudorfer examined the slides he made, referred to in the autopsy report. The slides showed portions of the coronary artery, which supplied blood to the portion of the heart muscle where the fresh infarct occurred, occluded by clots of blood. Dr. Neudorfer was unable to find any evidence of contusion or of damage to the chest area or to the heart, itself, and the microscopic slides showed no indication of trauma.

It was Dr. Neudorfer's opinion that Embry's death was caused by the fresh occlusion and infarct, and that the automobile accident sustained by Embry had absolutely nothing to do with his death four weeks later.

Dr. Neudorfer testified that atherosclerosis is the progressive development of deposits in the walls of the blood vessels. These deposits consist of fatty substances that contain cholesterol. Such deposits, as they become larger, produce a thickening of the vessel walls and a narrowing of the lumen (the passageway through which the blood travels in the blood vessels). As the disease progresses, calcium salt becomes deposited in the plaques in the blood vessel walls and the condition is then spoken of as arteriosclerosis. Sometimes the plaques in the blood vessel walls become ulcerated and a clot forms.

He further testified that Embry had a very advanced arteriosclerosis and atherosclerosis in all branches of the coronary arteries. That is to say, that the disease had progressed to the state where the blood vessels and all branches of the coronary arteries ceased to function properly, because of a narrowing of the lumen and the slowing of the movement of the blood into such arteries.

Embry had an enlarged heart of long duration, caused by the progressive coronary artery disease. It weighed 550 grams.

Advanced arteriosclerosis is an irreversible disease, that is, it is a progressive disease that keeps on getting worse, and there is no such thing as dormant or static or inactive advanced arteriosclerosis.

Embry's coronary artery disease was not only far advanced, but it was active, energized, and progressive, and was not passive or static.

Mrs. Embry testified that when Embry returned from Hays, Kansas, the evening of May 23, 1963, his hands were trembling and were clammy, ice cold, although it was not a cold evening; that Embry said he wanted to sit down; that she suggested he lie down; that he said he could not lie down, and that his back and chest hurt; that he sat up the rest of the night with pillows at his back; that he did not want to go to bed; that she brought him a plate of food for his dinner, and that he ate only a small portion of it; that he continued to have chest pains and back pains and was never comfortable after the accident until his death; that on Saturday, May 25, 1963, she noticed red spots on his chest; that later they turned purplish; that he returned to his office the Monday following the accident, but left home late and came home early, contrary to what had been his usual custom; that he suffered from indigestion; that after a trip to Lawrence, Kansas, and to The Homestead in Virginia, he continued to go to his office late and return home early; that when he returned home he would rest and fall asleep, which was not his custom before the accident.

Dr. R. M. Gouldner, called as a witness for Mrs. Embry, testified he had practiced medicine for 52 years; that he went through college and then graduated from law school; that he then decided to study medicine and graduated from medical school; that he took postgraduate work as an intern, resident, and house surgeon; that he was not a cardiologist, but that his specialty was surgery; that in his practice of surgery he observed how long it took for cuts to heal; that it depended on the size and depth of the cut into the tissue; that an appendectomy scar would heal in a week; that some finger wounds would heal in five days; that wounds of the liver took longer; that a stab wound of the heart that did not perforate would heal within eight or ten days. He apparently had no experience with re-

spect to the time it would take to heal an infarct of a portion of the heart.

In answer to a hypothetical question, Dr. Gouldner said that when the accident occurred Embry was a healthy man and after the accident, "all of a sudden" he "cannot put in full hours at his work" and has pain in his chest and back, and from that he concluded that "something happened to that heart that caused his death."

Dr. Nathaniel Shafer testified by deposition, as a witness for Mrs. Embry. The deposition was read to the jury at the trial. Dr. Shafer's testimony was to the following purport:

He took a premedical course at New York University; graduated with the degree of M.D. from New York University Bellevue Medical Center; interned at the Jewish Hospital of Brooklyn; that he had three years of residency and fellowship training at Kings County Hospital, Mount Sinai Hospital, and Montefiore; that at Mt. Sinai he was a fellow in cardiology; that he was Chief of Cardiology in the United States Army from 1958 to 1960; that since then he had practiced cardiology; that he was a member of the American College of Cardiology and a fellow of the American College of Angiology, which has to do with blood vessels. He had made a study of nonpenetrating injuries to the heart and their effects.

He examined the autopsy report. It was his opinion, based on the facts given in the hypothetical question and the autopsy report, that the accident of May 23, 1963, was the cause of Embry's death on June 24, 1963. The basis for his opinion was:

> "The man had an injury severe enough to break a steering wheel. He hit his chest. He had chest pains. He had an elevated pressure right afterwards. He

had symptoms of pallor, clammy hands, sweating and emotional shock. Certainly chest pains, sweating, clammy hands, and pallor are symptoms of heart damage. He continued to complain of these symptoms, was tired, pains in the left arm, continuing heartburn, and as a matter of fact, at post-mortem we don't see any other cause for heartburn in this man except a heart condition, and then he died. The man was tall. He wasn't overweight. Taller people have statistically lesser chance of having natural heart attacks. He was very young, fifty-one. He seemed to have no other precipitation or no other causes or coronary thromboses or heart attacks, such as diabetes, high blood pressure, overweight, and then he was in good health until this happened. We know this may happen by several mechanisms and heart injuries.

"Q. Would you explain to us what, in your opinion, what the mechanism is that happened in this case: A. We see that there is complete occlusion of the first portion of the descending branch of the left coronary artery. Left coronary artery comes down the front of the heart, is right beneath the breast bone, and as he struck his chest against the steering wheel, this artery is very easily injured, and one of the ways that it reacts to injury is that there may be a hemorrhage into the wall and/or a thrombus in the wall of the coronary arteries and here we see a thrombus in the coronary artery with a healed infarct in the anterior wall of the left ventricle of the heart. An infarct is a healed area of dead tissue. This one is older, and just reviewing the pathological findings, it is certainly compatible with an age of four weeks when he had the injury. This healed infarct may be four weeks old. Then we have a recent infarct in another coronary artery a month later. This is

certainly in keeping with the latent period or the time when an injury may damage a coronary artery only partially and go on to cause a complete occlusion in the artery within that one month's time. Certainly, emotional and physical stressful factors may cause an occlusion in an artery and a heart attack, and a month's time for this to occur is a perfectly acceptable time."

On cross-examination, he admitted the healed infarct could be five weeks old, which would antedate the accident, but that it could have been four weeks old. He agreed with Dr. Neudorfer's statement that he found advanced arteriosclerosis in the coronary arteries of Embry and complete occlusion in the right coronary artery by thrombotic material; that arteriosclerosis is a progressive development of deposits in the walls of the blood vessels; that such deposits consist of fatty substances containing cholesterol; and that Embry had that progressive development of deposits in the walls of the blood vessels prior to the accident.

When asked on cross-examination if the coronary arteriosclerosis at and prior to the time of the accident was in a progressive state, Dr. Shafer refused to express an opinion and stated it may or may not have been.

And on cross-examination, Dr. Shafer stated that Embry must have had advanced coronary arteriosclerosis prior to the accident and have had it for a number of years; that the injuries which Embry suffered at the time of the accident combined with coronary arteriosclerosis and caused Embry's death.

In addition to Dr. Neudorfer, three well-qualified and experienced physicians testified at the trial as experts in

behalf of Equitable. They were Dr. William L. Hayes, Dr. Richard Lawrence Sifford, and Dr. Robert H. Kelly.

Dr. Hayes specialized in cardiology. He graduated from the University of Kansas Medical Center in 1953. He was in the Air Force from 1954 to 1956. He took a residency training in internal medicine at the University of Kansas Medical Center from 1956 until 1960. He took training at that institution in a fellowship in cardiovascular disease from 1960 to 1961 and was assigned to the Kansas University Medical Center's Veterans Hospital in Kansas City, where he was assistant chief of medicine and chief of the cardiovascular section. Since 1964, he has practiced in Wichita. He is certified by the American Board of Internal Medicine and in the subspecialty of cardiovascular disease. He is a fellow of the American College of Physicians and a fellow in the American College of Cardiology. About 90 per cent of his practice is devoted to the heart.

Dr. Sifford holds the degree of B.A. and B.S. He received the degree of M.D. from the University of Iowa in 1952. He took an internship in internal medicine at the University of Utah from 1952 to 1953. He then served as a physician in the United States Navy for two years. He then returned to the University of Utah and had a year of specialized training for a period of two years as a National Institute's of Health Cardiac Fellow, doing clinical work and research in heart disease. Since 1958 he has practiced medicine in Wichita. He is a Diplomate of the American Board of Internal Medicine and a Fellow of the American College of Chest Physicians. At the time he testified, he was the head of the heart station at St. Joseph Hospital in Wichita and the co-head of the heart station at St. Francis Hospital in Wichita.

Dr. Kelly specialized in the field of pathology. After taking his medical training at Western Reserve University, he stayed on as a resident fellow at Western Reserve University's Institute of Pathology at University Hospital in Cleveland, Ohio.

The three doctors last above mentioned each testified that Embry died as the direct and sole result of a severely advanced coronary heart disease called arteriosclerosis, and that the automobile accident was completely unrelated to and had nothing whatever to do with Embry's death.

In response to a question as to whether the underlying cause of the occlusion and infarct in Embry's heart which occurred within 12 hours before he died was arteriosclerotic heart disease, Dr. Hayes testified that it is a process of deposition of lipids, cholesterol, and other fatty materials in the walls of the arteries, and this in turn is followed by scarring and the laying down of scar tissue around these lipid deposits, and this process progresses until it finally either completely obstructs the artery, in this case the coronary artery, or so narrows it that the blood flow through the artery is so slow and sluggish that it clots and a clot or thrombus forms, which completes the occlusion of the artery, and then the heart muscle in that area, which is dependent on that artery for its blood supply, dies, and that such condition is known as an infarction.

Doctors Sifford and Kelly described the disease of Embry's heart in the same manner. All three doctors described Embry's coronary arteriosclerosis as a disease which had been in an active, energized, and progressive state long before the accident, and which was not aggravated nor activated in any way whatever by the accident.

Dr. Sifford disputed Dr. Shafer's opinion that a person does not have a disease until he has objective signs thereof, and called such an opinion "very unsound theory."

All of Equitable's doctors testified that the normal weight of a heart in a man of Embry's size would be 350 to 375 grams, and that such enlargement was of long-standing duration and was a manifestation of coronary artery disease.

Dr. Kelly microscopically examined the slides of tissue prepared by Dr. Neudorfer, and particularly the scar tissue in the heart and testified that the old infarct, which Mrs. Embry's chief expert, Dr. Shafer, assumed was caused by the automobile accident, was a minimum of nine months or older at the time of the accident.

We are of the opinion that the issues presented for determination by the jury were:

Was the advanced arteriosclerosis disease of Embry's coronary arteries, which caused the infarct, dormant at the time of the accident; and did the accident aggravate or energize such dormant disease, or was such disease advanced, active, progressive, and energized prior to and at the time of the accident.

In his charge to the jury, the court followed very closely the test laid down by the Supreme Court of Kansas in Williams v. Benefit Trust Life Insurance Company, supra.

In part, he charged the jury in substance as follows: That if they found Embry had advanced arteriosclerosis disease of his coronary arteries prior to and at the time of the accident, but at the time of the accident such disease was dormant, and the accident energized and activated such disease and Embry's death resulted therefrom, then they should answer the special interrogatory in the affir-

mative; but if Embry had such disease at and prior to the time of the accident, and if at the time of the accident it was advanced, active, progressive, and energized and Embry's death resulted therefrom, then they should answer it in the negative.

After a full and careful examination of the entire record and the appendix, we are of the opinion that the trial proceedings were free from error and the judgment is therefore

AFFIRMED.

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, DATED MARCH 20, 1969

Memorandum Overruling Plaintiff's Motion for Summary Judgment

This suit, brought by the plaintiff, Betty N. Embry, was originally filed in the District Court of Sedgwick County, Kansas. It was removed upon petition of the defendants, The Equitable Life Assurance Society of the United States and Woodmen of the World Life Insurance Society, to this forum; in that the case contained the elements necessary to satisfy this Court's jurisdictional requirements, i.e., diversity of citizenship and an amount in controversy in excess of $10,000.00.

The Court is concerned herein with plaintiff's motion for summary judgment against one of the defendants, The Equitable Life Assurance Society of the United States (hereinafter referred to as "Equitable").

It appears from the pleadings that the plaintiff is the surviving spouse of E. Ned Embry, who, during his lifetime, was an employee of Equitable. On May 23, 1963, Embry, pursuant to his duties as Equitable's Agency Manager for the State of Kansas, was involved in an automobile accident in Rush County, Kansas. Following the accident he was hospitalized for a period of some three hours; thereafter resuming his duties. From that time on, however, his state of health declined, although he continued to carry on his normal activities, including the functions of his employment. On June 24, 1963, E. Ned Embry died.

During his lifetime the decedent had become owner of several policies of life insurance. In four of these, the insurer was the defendant Equitable, and in one of them

the insurer was the defendant Woodmen of the World Life Insurance Society (the Court not being concerned in this opinion with the defendant Woodmen of the World Life Insurance Society, due to the fact that plaintiff's motion for summary judgment addressed itself solely to Equitable). In three of Equitable's policies there appeared double indemnity clauses which, in essence, provided for doubling the payment of the face values in the event that the insured died from accidental causes. The fourth Equitable policy simply provided for the payment of a fixed sum if the insured died an accidental death.

Following his death, Equitable made certain payments to plaintiff but denied that the death occurred through accidental causes and, consequently, refused to pay those sums provided for in the policies which would become due in the event of death by accident. Subsequently, plaintiff brought this action seeking recovery from Equitable in the amount of $75,000.00, which is the sum owing the plaintiff under the policies if the decedent died from accidental causes within the scope of the policy provisions.

Prior to the filing of this suit, plaintiff instituted Workmen's Compensation proceedings against her deceased husband's employer, Equitable, and its insurance carrier, wherein she contended that her husband's death resulted from the aforementioned accident and that, accordingly, she was entitled to benefits under the Workmen's Compensation Act, as provided in K.S.A. 44-501, et seq. At a hearing, evidence was received by the Examiner, acting for the Director, upon the following subject:

> "The questions involved in this case are: Did the decedent meet with personal injury by accident arising out of and in the course of his employment, on May

23, 1963, which resulted in his death on June 24, 1963; the dependency of the claimant, and the amount of compensation to be allowed, if any."

After evidence was heard, the Examiner resolved the issue as follows:

"Findings of Fact

It is found in addition to the stipulations of the parties, that the decedent suffered personal injury by accident arising out of and in the course of his employment with the respondent on May 23, 1963, which accelerated or precipitated his death on June 24, 1963. The examiner is aware that both Dr. Nerdorfer and Dr. Hayes testified that the accident did not, in their opinion, cause the decedent's death, but Dr. Gary Wood testified to the contrary, and the evidence relative to the decedent's physical condition from the time of the accident up to his death would lead one to believe that there must be a connection, certainly too much to be called a coincidence."

An award of $15,000.00, payable at a rate of $42.00 per week, plus an allowance for funeral and medical expenses, was made.

Equitable and its insurance carrier then appealed the Examiner's decision to the District Court of Rush County, Kansas. There, after reviewing all the evidence, including medical testimony, Judge Maurice A. Wildgen stated in his memorandum opinion:

"This Court likes to think that the real issue in this case is whether or not there is a causal relation between the trauma Embry experienced when he had his automobile accident on May 23, 1963, and the cause of his death which took place June 24, 1963. If there was no causal connection the claimant is not en-

titled to recover; but if the decedent's death was hastened, or precipitated, or his physical condition aggravated and worsened by reason of the injuries he sustained May 23, 1963, then the claimant should recover.

Findings of Fact

1. Betty Embry, surviving spouse of E. Ned Embry, was entirely and wholly dependant upon her husband, and his sole dependent on May 23, 1963, and on June 24, 1963.

2. The automobile accident in which Embry was involved on May 23, 1963, arose out of and in the course of his employment with Equitable Life Assurance Society, the Respondent.

3. The injury Embry sustained in the automobile accident on May 23, 1963, aggravated a prior existing physical condition, and accelerated and precipitated his death on June 24, 1963.

4. The death of Embry on June 24, 1963, was caused by, precipitated and accelerated by the accidental injury Embry suffered on May 23, 1963. In this connection, this Court believes the claimant successfully met the burden of proof, which was her obligation in any event."

Judge Wildgen affirmed the Examiner's finding, and Equitable did not appeal to the Kansas Supreme Court. Thus, the Rush County District Court's decision stands as a final one.

In her petition and brief filed in support of the motion for summary judgment, plaintiff asserts that she is entitled to the amounts specified in the policies which were to become due in case of death by accident because her

husband did, in fact, die as a result of the bodily injuries sustained in the automobile accident. In support of this contention, she relies on the decision made by the Workmen's Compensation Director and affirmed by the Rush County District Court, i.e., that E. Ned Embry's death "was caused by, precipitated and accelerated by the accidental injury Embry suffered on May 23, 1963. . . ." She claims that this finding is determinative of the accidental death issue and that Equitable be bound thereby under the doctrine of res judicata and collateral estoppel. The foregoing issues are now to be decided by this Court.

The principle of res judicata is indeed a necessary one in our judicial system. Without it, litigation of issues could possibly continue ad infinitum. The effect of this simple doctrine is "that a cause of action once finally determined, without appeal, between the parties, on the merits, by a competent tribunal cannot afterwards be litigated by a new proceeding, either before the same or any other tribunal." See *Jayhawk Equipment Co. v. Mentzer*, 191 Kan. 57 (1963).

In order to ascertain if res judicata is applicable, it is necessary to determine if a subsequent action possesses certain qualities identical with those found in a previous proceeding. These are: (1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of persons and of parties to the action; and (4) identity of the quality in the person for or against whom the claim is made. See *McDonald v. Joint Rural High School Dist. No. 9*, 180 Kan. 563 (1957). If these attributes are the same in both proceedings, the doctrine applies; if there are differences, the doctrine is inapplicable. Utilizing this rule in the instant case, it is obvious, after a mere cursory glance, that there are differences in the "thing sued for" and in "the cause of action" between the present action and the

previous one. In the Workmen's Compensation proceeding, the "thing sued for" was benefits available under that Act for personal injury sustained by an employee through accident arising out of and in the course of employment. See K.S.A. 44-501, et seq. Further, there the "cause of action" was based on the Act itself, which is founded upon the contract of employment. See *Johnson v. Ismert-Hincke Milling Co.*, 116 Kan. 731 (1924). In the action now before this Court, the "thing sued for" is the sum of money allegedly owing under double indemnity clauses contained in life insurance policies in existence between the insured and the insurer, and the "cause of action" is based upon the common law principles of contract. Thus, variances do exist in the identity of these two elements.

Another test which may be used in determining the applicabllity of res judicata to a subsequent action is "whether or not the issues in the present action *could have been litigated in the former action.*" See *Jayhawk Equipment Co. v. Mentzer,* supra. (Emphasis in original.) In that case, the Court said:

> "A short approach as to whether the issue in this action would have been litigated in the former action is to determine whether the two causes of action could have been joined." Id. at 62.

Applying this test to the instant case, the Court notes that proceedings under the Workmen's Compensation Act are limited in scope. The Act itself was conceived as a matter of public policy in order to provide protection to employees by making their employers—within the limits of the Act—liable for compensation for personal injuries by accident. A proceeding thereunder is limited to the resolution of "any and all questions arising under the Act." See *Anchor Casualty Co. v. Wise,* 172 Kan. 539, 544 (1952). This being the case, it is evident that questions or issues extraneous

of the Act are not and cannot be decided in such a proceeding. Thus, in that the present cause of action concerns itself with contractual matters unrelated to the Act, it necessarily follows that it could not have been joined in the previous Workmen's Compensation proceeding. Consequently, the cause of action now before this Court could not have been litigated in the former action.

Finally, the Court notes that in Workmen's Compensation cases, the rule is that benefits may be awarded if an employee sustains an injury which operates on a pre-existing infection or disease in such a way that it makes a "substantial contribution to the ultimate result," i.e., the death of the employee. See *Vera* v. *Swift & Co.*, 143 Kan. 593, 604 (1936).

The Kansas Supreme Court, in the late case of *Strasser* v. *Jones*, 186 Kan. 507, at 511, clearly sets forth the rule relating to the application of the compensation act to accidental injuries which worsen or aggravate pre-existing physical conditions, and states:

> "The act prescribes no standard of health for workmen, and where a workman is not in sound health but is accepted for employment, and a subsequent industrial accident suffered by him aggravates his condition resulting in disability, he is not to be denied compensation merely because of a pre-existing physical condition. In other words, it is well settled that an accidental injury is compensable where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction." (*Holler* v. *Dickey Clay Mfg. Co.*, 157 Kan. 355, syl. 6, p. 365, 139 P.2d 846, 148 A.L.R. 1131; *Copenhaver* v. *Sykes*, 160 Kan. 238, syl. 1, p. 243, 160 P.2d 235; *Kauffman* v. *Co-operative Refinery Assn.*, 170 Kan. 325, 328, 225 P.2d 129; *Johnson* v. *Skelly Oil Co.*, 181 Kan. 655, 656, 312 P.2d 1076.)

Thus, compensation may be awarded in the statutory proceeding if the accidental injuries aggravated or intensified a pre-existing disease or affliction—*known or unknown*. From the record before this Court of the proceedings already conducted in this case, it is evident that benefits were awarded to the plaintiff because Embry's accident precipitated and aggravated his heart condition. The Court is unable to ascertain from the factual material before him whether the heart condition was a known or unknown one.

On the other hand, the Court notes that the Equitable policies involved herein all condition the payment of benefits for death from accident by certain language. For the sakes of exegesis, and by way of example, Equitable Policy No. SM 11,228,817 states that the death of the insured must have:

> ". . . resulted solely from bodily injuries caused directly, exclusively and independently of all other causes by external, violent and purely accidental means, provided such death occurred within 90 days after the date of such injuries, and while said policy and this Additional Indemnity provision were in force and no premium thereunder in default and before the anniversary of the Register date of said policy upon which the Insured's age at nearest birthday is 65 years, and provided further that such death shall not be the result of or caused directly or indirectly by . . . disease or illness of any kind, or physical or mental infirmity. . . ."

In sum, it is evident that the double indemnity benefits are payable only if the insured died directly, exclusively and independently from bodily injuries caused by accidental means. Specifically excluded from coverage is death resulting either directly or indirectly from disease or illness. It is apparent then that a different standard exists for accidental death payments under these

policies than the one utilized in the Workmen's Compensation proceeding—one being contractual and the other statutory. As was noted above, the plaintiff received compensation under the Act for her husband's death because it was determined that the accident "aggravated a prior existing physical condition, and accelerated and precipitated his death. . . ." Under the policies, however, a narrower standard exists in that it is clearly stated that the beneficiary shall not be entitled to the sums provided for in the double indemnity clause if the death is a "result of or caused directly or indirectly by . . . disease or illness . . . ."

The bellwether case in Kansas on disability from accidental injury which aggravates pre-existing disease or affliction, is *Williams v. Benefit Trust Life Insurance Co.*, 200 Kan. 51. That case involved the interpretation under an existing factual situation of accident benefits under an accident and sickness income policy. From the cases the Court has examined, as the Court sees it, there is no difference, or should be no difference, in the interpretation of similar clauses in sickness-and-accident policies and double indemnity provisions for accidental death in a life insurance policy with provisions similar to the one at bar. The *Williams* case, supra, lays down the rule for contractual liability of the insurance company and holds that "where an accidental injury aggravates or energizes a dormant disease or physical ailment, the accident may be said to have been the proximate cause of the resulting disability within the terms and meaning of the ordinary accident insurance policy."

The distinction in the legal standard between the statutory one following the Workmen's Compensation Act and the contractual one considered in the *Williams* case, is that in the latter the disease or physical ailment which

was aggravated or energized was a *dormant or unknown one*, whereas the Workmen's Compensation Act provides compensation whether the pre-existing condition was known or unknown.

Clearly, the interpretation of the policy here must be made in line with the legal requirements laid down by the Kansas Supreme Court. The Tenth Circuit, in the case of *Kansas City Life Insurance Co.* v. *Hayes*, 184 F.2d 327 (1950), a case arising under Utah law and under a double indemnity policy, has apparently followed the law of Utah, which is the same as the Kansas rule recently laid down by the Kansas Supreme Court in the *Williams* case. Consequently, because of this variation in standards of legal proof, it is not possible for this Court to adopt the position of the plaintiff. The Court must conclude, therefore, that the standard used in the Workmen's Compensation proceeding is not applicable, nor is it the same as the one required by the double indemnity clause contained in these policies; nor can the Court say that all of the facts necessary for summary judgment exist at this time.

In view of the foregoing, it is the determination of this Court that the accidental death issue is not barred by either the doctrine of res judicata or collateral estoppel and, accordingly, the plaintiff's motion for summary judgment is denied.

Dated at Wichita, Kansas, this 19th day of March, 1969.

/s/ Frank G. Theis
United States District Judge

SPECIAL VERDICT

[Filed 3-27-70]

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF KANSAS

BETTY N. EMBRY,

Plaintiff,

v.

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Defendant.

No. W-3963

We, the Jury, find the death of E. NED EMBRY (*circle your answer*) was (was not) proximately caused by the accident of May 23, 1963.

/s/ Donald D. Geist
(Foreman)

3-27, 1970.
(Date)

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FILED
MAR 10 1972
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1034

BETTY N. EMBRY,
Petitioner,
vs.
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

*HENRY V. GOTT
RONALD M. GOTT
923 First National Bank Building
Wichita, Kansas 67202

Of Counsel:
LILLESTON, SPRADLING, GOTT, STALLWITZ & HOPE
923 First National Bank Building
Wichita, Kansas 67202

March 8, 1972

*Counsel upon whom service is to be made.

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3080

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BRIEF IN OPPOSITION

QUESTION PRESENTED

Should this Court grant certiorari in this action for double indemnity benefits under life insurance contracts in which the Court of Appeals affirmed a judgment in favor of the defendant insurance company after a jury trial in Federal District Court?

The action was brought under life insurance policies which defined accidental death as resulting solely from bodily injuries caused directly, exclusively and inde-

pendently of all other causes by external, violent and accidental means; and which specifically excluded death resulting from or caused directly or indirectly by disease or illness of any kind or physical or mental infirmity. The petitioner contends that a conclusion of accidental death under the Kansas Workmen's Compensation Statutes gives rise to a collateral estoppel and requires payment of double indemnity benefits under these life insurance contracts. Respondent, on the other hand, contends that the doctrine of collateral estoppel has no application and that it was entitled to a jury trial on the issue of liability for double indemnity under these life insurance contracts, and that the conclusion of the Federal District Court and the Court of Appeals should not be disturbed.

STATEMENT OF THE CASE

In its instructions to the jury (R. 306-317) the District Court followed virtually verbatim the language of the Kansas Supreme Court in *Williams* v. *Benefit Trust Life Ins. Co.*, 200 Kan. 51, 55, 434 P.2d 765 (1967), an insurance case involving insuring language similar to that contained in the policies here. Petitioner did not object to any of the instructions so given, nor did she object to the form of the special verdict. (R. 317). Petitioner did not request an instruction informing the jury that advanced arteriosclerosis is considered "dormant" in Kansas as a matter of law in determining benefits under accidental death clauses in insurance contracts. (R. 76-78). That contention is raised here for the first time by petitioner.

The findings in the prior Workmen's Compensation Act proceedings do not mention the role which Embry's pre-existing heart disease played in his death. That issue was not there tendered, necessarily involved, nor litigated and determined. Petitioner so admits at page 7 of her Petition. In the instant action, the nature and extent of

Embry's pre-existing heart disease, and its role in his death, were vital issues which were pleaded as defenses by Equitable (R. 26-32), and were litigated and actually determined by the jury, as evidenced by the District Court's instructions and the jury verdict thereunder which resolved all conflicting issues in favor of Equitable. Obviously such issues were tendered and resolved in this case since one of the conditions for recovery spelled out in the insurance contracts requires that disease not cause or contribute to death.

The District Court, in overruling petitioner's Motion for Summary Judgment on the theory of collateral estoppel, correctly stated:

> "It is apparent then that a different standard exists for accidental death payments under these policies than the one utilized in the Workmen's Compensation proceeding—one being contractual and the other statutory. As was noted above, the plaintiff received compensation under the Act for her husband's death because it was determined that the accident 'aggravated a prior existing physical condition, and accelerated and precipitated his death. . . .' Under the policies, however, a narrower standard exists in that it is clearly stated that the beneficiary shall not be entitled to the sums provided for in the double indemnity clause if the death is a 'result of or caused directly or indirectly by . . . disease or illness. . . .'" (A50, 51, of Petition).

Similarly, the Court of Appeals correctly observed:

> "But, in the compensation proceeding the District Court of Rush County decided whether Embry's death was accidental within the meaning of the provisions of the Workmen's Compensation Act. Here, the issue is whether Embry's death was accidental under the

provisions of the policies, and particularly the provisions thereof excluding from the accidental coverage death caused directly or indirectly by disease or illness of any kind or by mental infirmity. It seems obvious that the issues of fact and law as to whether Embry's death was accidental under the Workmen's Compensation Act and whether it was accidental under the provisions of the policies are not identical, but are separate and distinct issues and do not come within the second rule laid down by the Henderson case, supra." (A26 of Petition, *Embry* v. *The Equitable Life Assurance Society of the U. S.*, 451 F.2d 470, at 477).

Petitioner's statement on page 5 of her Petition that an action for workmen's compensation benefits is contractual in nature is taken out of context and totally inapplicable to the issues here presented. The case cited by petitioner (*Gawjth* v. *Gages Plumbing & Heating Co., Inc.*, 206 Kan. 169, 476 P.2d 966. [1971]) in support of such contention concerns the separation of powers doctrine between the legislative and judicial branches, and the "contract," referred to relates to the relationship of an employee to his employer, and not to proceedings under the Workmen's Compensation Statutes.

ARGUMENT

I. The doctrine of collateral estoppel is clearly inapplicable, as was correctly determined by the District Court and the Court of Appeals.

Petitioner's entire argument in paragraph I under "Reasons for Granting the Writ" presupposes and assumes that Embry's coronary arteriosclerosis was "dormant" at and prior to the accident of May 23, 1963. As stated, the assertion that coronary arteriosclerosis is considered "dormant" as a matter of law in Kansas has never before been raised by petitioner. We fail to understand how

petitioner can now initiate such a patently absurd contention when she totally failed to urge such at the trial, either through requested instructions, argument to the court, or otherwise. If such were the law, then the nonapplication of the doctrine of collateral estoppel to our situation might not have been so "apparent" to the District Court, nor so "obvious" to the Court of Appeals.

The Workmen's Compensation Act is totally statutory, was conceived and is founded on broad social considerations, is liberally construed in favor of workmen, and proceedings thereunder are exclusively limited to questions arising under the Act." *Anchor Casualty Co.* v. *Wise*, 172 Kan. 539, 241 P.2d 484 (1952); *Thuillez* v. *Yellow Transit Freight Lines*, 187 Kan. 618, 358 P.2d 676 (1961); and *Madison* v. *Key Work Clothes*, 182 Kan. 186, 318 P.2d 991 (1957).

The insurance policies in this case are contracts, and liability is measured by the insuring language thereof. Unambiguous insurance provisions defining the conditions for recovery must be construed in their ordinary sense as written, are binding on the parties, and must be enforced according to their plain terms. *Braly* v. *Commercial Casualty Ins. Co.*, 170 Kan. 531, 227 P.2d 571 (1951); *Knouse* v. *Equitable Life Ins. Co.*, 163 Kan. 213, 181 P.2d 310 (1947); and *Brown* v. *Metropolitan Ins. Co.*, 166 Kan. 616, 203 P.2d 150 (1949), where the court states:

> "Above all else it must be kept in mind this action is predicated upon an insurance contract the terms of which are binding upon the parties and cannot be changed by the courts. Indeed, unless the provisions in question are ambiguous, the rule is they are not susceptible of judicial interpretation but must be construed in their ordinary sense (*Watkins* v. *Metropolitan Life Insurance Co.*, 156 Kan. 27, 29, 131 P.2d

722; *Bott* v. *Equitable Life Assur. Society*, 147 Kan. 671, 78 P.2d 860; *Lane* v. *Insurance Co.*, 109 Kan. 296, 198 Pac. 948; *Spence* v. *New York Life Ins. Co.*, 154 Kan. 379, 118 P.2d 514)."

The rule of collateral estoppel expressed by the Court of Appeals in its opinion in this case, citing *Henderson* v. *United States Radiator Corporation*, 78 F.2d 674 (10th Cir.), is as follows:

> "(2) Any right, fact or matter in issue and directly adjudicated, or necessarily involved in the determination of an action before a competent court in which a judgment or decree has been rendered upon the merits, is conclusively settled by the judgment therein and cannot again be litigated between the same parties and their privies, whether the claim, demand, purpose or subject-matter of the two suits is the same or not.
>
> "The principle of the . . . rule is referred to as . . . 'conclusiveness of judgment.'" (*Embry*, 451 F.2d 470, at 472).

We agree with the District Court and the Court of Appeals that it does indeed seem apparent and obvious that the conditions for recovery under the statutory Workmen's Compensation Act and under the insurance contracts are different and involve separate and distinct issues, and that, therefore, collateral estoppel does not apply.

Petitioner's exercise in sophistry in discussing the intricacies of the full faith and credits clause as applied to the doctrine of collateral estoppel is wholly inapplicable to the issues in our case. It is based on the fallacy that the issues in the two cases were identical, when the contrary is apparent and obvious. It is also based on the patently erroneous assumption that coronary arteriosclerosis is

considered "dormant" as a matter of law in Kansas under insurance cases.

II. Coronary arteriosclerosis is not considered a "dormant" disease as a matter of law under insurance cases in Kansas or any other jurisdiction.

The most incredible theme woven throughout the entire Petition, and the one which forms the basis for all of Petitioner's arguments and contentions, is that coronary arteriosclerosis is considered "dormant" as a matter of law in Kansas. The fact that such an assertion is medically and legally absurd is or should be all the more embarrassing to petitioner when we recall that she has never ever mentioned such a contention until it surfaced in her Petition here. Certainly no such argument was advanced by her at the trial, for she not only failed to object to any of the court's instructions, and the form of special verdict, but she did not tender or request an instruction even remotely suggesting such an unsound rule.

The *Williams* case, supra, upon which petitioner so strongly relies, actually states quite the opposite. One of the essential and vital issues in any case of this kind is the nature of a preexisting disease in the insured—that is, was it "dormant" or was it "active" at the time of the accident. The Kansas Supreme Court considers such determination to be one for the jury. The Kansas court states the rule in *Williams*, supra, as follows:

> "We think the better reasoned rule, and the rule which, in effect, was followed in *Williams* v. *General A. F. & L. Assurance Corp.*, supra, to be just this: that where an accidental injury aggravates or energizes a dormant disease or physical ailment the accident may be said to have been the proximate cause of the resulting disability within the terms and meaning of

the ordinary accident insurance policy." (*Williams*, 434 P.2d 765, 769).

The District Court literally followed this rule and gave the following instruction, to which petitioner did not object:

> "Now, in determining whether or not death resulted solely or proximately from bodily injuries, caused directly, exclusively and independently of all other causes, by external, violent and purely accidental means, you are instructed that when an accidental injury aggravates or energizes a dormant disease or physical ailment, the accident may be said to have been the proximate cause of the resulting death, and that death resulted from accident within the terms and meanings of the policies here in question." (R. 311).

Then immediately after stating the rule above quoted, the Kansas court in *Williams*, supra, states:

> "Such is the rule laid down in *Howe* v. *National Life Ins. Co.*, 321 Mass. 283, 72 N.E. 2d 425, 170 A.L.R. 1254, where it was said:
>
> "'. . . A death caused by bodily injuries accidentally sustained would be within the terms of the policy if the accident, by reason of the frailty or general weakness of the insured, a predisposition to a disease, or the presence of a disease then inactive or dormant, resulted in a fatal termination, even if this result would not have followed if the injured person was in normal health. . . .'" (p. 287).

The District Court again lifted such rule literally and instructed as follows, petitioner again not objecting:

> "A death caused by bodily injuries, accidentally sustained, would be within the terms of the policy

> provision which I have quoted to you, when, by reason of the frailty or general weakness of the insured, a predisposition to a disease or the presence of a disease then inactive or dormant, such accidental injuries resulted in a fatal termination, even if this result would not have followed if the injured person was in normal health." (R. 311). (*Williams*, 434 P.2d 765, 769).

Other such examples of how literally close the District Court followed the Kansas law in instructing the jury could be cited. For instance, the District Court defined for the jury in its instructions the word "dormant" and the word "active" (R. 313), utilizing exactly the same language as the Kansas Supreme Court in *Williams*, supra.

In view of the above, it is difficult to follow petitioner's argument that the Federal Courts did not apply the law of the State of Kansas. At the trial, petitioner did not object to the jury determining the question of the "dormancy" or "activity" of Embry's coronary arteriosclerosis. Petitioner did not at any stage of the proceeding endeavor to have the District Court rule as a matter of law that coronary arteriosclerosis is a "dormant" disease under insurance contract cases. Nor did she proffer such suggestion in any form whatsoever to the District Court during the trial.

In its opinion, the Court of Appeals answers petitioner's contention that the Federal Courts failed to follow the law of the State of Kansas by stating:

> "In his charge to the jury, the court followed very closely the test laid down by the Supreme Court of Kansas in Williams v. Benefit Trust Life Insurance Company, supra." (*Embry*, 451 F.2d 470, at 485).

CONCLUSION

Petitioner fully advanced, agreed with and supported the theories under which this case was tried to the jury by the District Court. She made no objections to the instructions, to the form of special verdict, and she further failed to submit requested instructions which embody any of the contentions now raised here for the first time. Having lost the case at the District Court level, petitioner now seeks to change theories. The Equitable was clearly entitled to a jury trial on the issue of its contractual liability to petitioner. The decision below is manifestly correct in that it follows and applies the insurance law of the State of Kansas. That law was accurately and thoroughly summarized in the District Court's instructions to the jury. The decision will affect only the litigants herein and the decision is consonant with decisions in all other jurisdictions.

The Writ of Certiorari should be denied.

Respectfully submitted,

*Henry V. Gott
Ronald M. Gott
923 First National Bank Building
Wichita, Kansas 67202

Of Counsel:
Lilleston, Spradling, Gott, Stallwitz & Hope
923 First National Bank Building
Wichita, Kansas 67202

March 8, 1972

*Counsel upon whom service is to be made.

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vs.

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Respondent.

REPLY TO BRIEF IN OPPOSITION

ROBERT C. FOULSTON
ROBERT N. PARTRIDGE
*GERALD SAWATZKY
600 Fourth National Bank Building
Wichita, Kansas 67202
Attorneys for Petitioner

Of Counsel:
FOULSTON, SIEFKIN, POWERS & EBERHARDT
600 Fourth National Bank Building
Wichita, Kansas 67202

*Counsel upon whom service is to be made.

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1034

BETTY N. EMBRY,
Petitioner,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Respondent.

REPLY TO BRIEF IN OPPOSITION

Respondent Equitable attempts to by-pass the full faith and credit issue implicit in this case by presenting the same fallacious argument it made below. Equitable asserts that the "conditions for recovery under the statutory Workmen's Compensation Act and under the insurance contracts are different and involve separate and distinct issues" so that collateral estoppel does not apply. (Brief, p. 6). It is contended that the insurance policy provisions which deny benefits for accidental death if illness or disease causes death make the issues "different".

The fallacy inherent in this line of reasoning is readily apparent. For Kansas law unquestionably requires benefits to be paid under such provisions if an accident in fact aggravates an existing, dormant disease, resulting in death. The accidental aggravation of Embry's arteriosclerosis was a fact issue finally determined by the state court judgment.

This fact issue was the same as that again raised in this action. It was no longer open to relitigation. It follows that the federal district court is required to give full faith and credit to that judgment.

The only issue in this action which was not directly determined in the state court action was whether Embry's disease was "dormant". Yet Equitable, and the lower courts, say that the presence of this additional issue makes all issues in the two actions "different". This assertion deprives the doctrine of collateral estoppel of all vitality. For if separate elements making up a cause of action must all be determined in the prior suit before the prior judgment is binding in regard to any fact determination, the result is equivalent to holding that the causes of action must be identical in both cases before the prior judgment is binding. This result, then, gives no broader scope to the doctrine of collateral estoppel than the traditional doctrine of res judicata, wherein causes of action must be the same. For a court to say it is applying the doctrine of collateral estoppel, and then to apply it so restrictively as to permit the relitigation of a major fact issue already determined, is clearly a denial of full faith and credit.

The foregoing demonstrates that the full faith and credit issue raised in our petition is implicit in this case, and that the narrow and unrealistic concept of collateral estoppel as applied by the Court of Appeals constitutes a direct denial of full faith and credit required by 28 U.S.C. § 1738. Equitable has presented no valid answer to Kansas law making any prior fact determination final and binding in any future action between the parties. The factual determination that Embry's accident aggravated his disease and caused his death was therefore a final adjudication not subject to relitigation in this case.

Equitable makes several inaccurate statements in its Brief in Opposition. Equitable repeatedly asserts that

petitioner contends for the first time in this Court that Kansas law treats arteriosclerosis as "dormant". (Brief, pp. 2, 4, 7, 10). The truth is that this position was taken by petitioner from the beginning of this action. It was raised in the district court by motion for summary judgment prior to trial, and by motion for judgment at the end of the evidence. (R: 50, 318). Petitioner was not required again to ask instructions which would have required a verdict in her favor or to otherwise take formal exception to the overruling of her motions. *Mitzner* v. *Baylies*, 424 F.2d 814, 816 (D.C. Cir.). In the addendum to this Reply are reproduced excerpts from petitioner's brief, reply brief, and petition for rehearing filed with the Court of Appeals, all taking the same position. The clear statement of Kansas law in *Williams*, ignored by respondent and by the Court of Appeals, is that arterial disease is "dormant". If an accident aggravates the disease, resulting in death, liability is established.

The questions presented in our petition for certiorari are clearly raised by the decision of the Court of Appeals, and should be resolved for the reasons stated therein.

Respectfully submitted,

ROBERT C. FOULSTON
ROBERT N. PARTRIDGE
*GERALD SAWATZKY
600 Fourth National Bank Building
Wichita, Kansas 67202
Attorneys for Petitioner

Of Counsel:
FOULSTON, SIEFKIN, POWERS & EBERHARDT
600 Fourth National Bank Building
Wichita, Kansas 67202
*Counsel upon whom service is to be made.

ADDENDUM

Excerpt from Page 21 of Brief of Appellant in Court of Appeals.

"In the present trial, defendant sought to establish that Embry's arteriosclerosis was active and progressive and not dormant. Yet the evidence to this effect consisted of conclusions by medical witnesses who stated that these were medical definitions. All the doctors admitted that most men have arteriosclerosis in some degree, and many such men live normal lives to old age and die from other causes. Prior to the accident it is undisputed that Embry was leading a normal active life. It was implicit in the state court findings that Embry's diseased condition, discovered only by post mortem examination, had not disabled him in the slightest. Under the Kansas test for 'dormancy', his disease was obviously dormant for purposes of applying the terms of an accidental death insurance policy."

"5. The lower court opinion overruling plaintiff's motion for summary judgment erroneously stated that the test for dormancy was whether the prior diseased condition was 'unknown'. Thus, the case was ripe for summary judgment for plaintiff. Assuming, arguendo, an issue as to 'dormancy' remained to be tried in this action, the evidence presented in this trial conclusively showed the arteriosclerosis to be 'dormant' under the law laid down in *Williams* v. *Benefit Trust Life Ins. Co.*, 200 Kan. 51, 434 P.2d 765. Plaintiff's renewal of her motion for judgment at the end of the evidence therefore should have been sustained, in view of the state court's binding determination that the accident did precipitate, accelerate and cause Embry's death."

Excerpt from Page 8 and 9 of Reply Brief of Appellant in Court of Appeals.

"The trouble with defendant's argument is that under Kansas law arteriosclerosis is considered 'dormant' for accidental insurance loss purposes. *Williams* v. *Benefit Trust Life Ins. Co.*, 200 Kan. 51, 434 P.2d

765, approved and adopted the *Hooper* decision holding that admitted serious arterial disease which could have caused death in a matter of hours did not preclude recovery. The *Williams* case itself involved an admitted case of a diseased condition which would eventually have caused the disability which was accelerated by the accident. That undisputed fact did not preclude recovery.

Excerpt from Page 7 of Petition for Rehearing in Court of Appeals and from Supplement to Petition for Rehearing.

"II. The Court's Opinion Fails to Discuss and Apply Kansas Law Holding That Arteriosclerosis, Though Progressive, Is 'Dormant' in Determining Rights Under Accidental Death Clauses in Insurance Policies."

"28 U.S.C. Sec. 1738 provides in pertinent part that 'judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken.'

"The statute is applicable to state court judgments which are asserted to be binding in a federal district court within the state wherein that judgment was rendered. *American Surety Co.* v. *Baldwin*, 287 U.S. 156, 166, 77 L.Ed. 231, 237-238, where it is said:

" 'The full faith and credit clause, together with the legislation pursuant thereto, applies to judicial proceedings of a state court drawn in question in an independent proceeding in the federal courts.' (citing the predecessor statute).

"In *Forsyth* v. *Hammond*, 166 U.S. 506, 518, 41 L.Ed. 1095, 1100, it was recognized, regarding a state judgment, that 'Though the form and causes of action be different, a decision by a court of competent jurisdiction in respect to any essential fact . . . in the one action is conclusive between the parties in all subsequent actions.'

"Under Kansas law, dormancy of a disease is a different fact issue than the fact issue as to whether the disease has been aggravated by accident. The latter fact determined in favor of Mrs. Embry is entitled to full faith and credit."